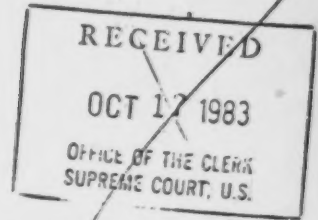


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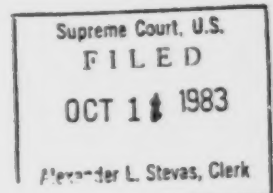


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JOSEPH ROBERT SPAZIANO,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.



=====

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

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### QUESTIONS PRESENTED

I. Whether the death sentence imposed upon petitioner violates the Eighth and Fourteenth Amendment principles of Beck v. Alabama, where the jury in this capital prosecution was not instructed as to any lesser-included offenses for the reason that the statute of limitations had run as to those lesser offenses?

II. Whether, even if the principles of Beck v. Alabama were not held to preclude, as a matter of law, the death sentence imposed where the jury was precluded from considering lesser-included offenses, in affirming the death sentence, the Florida Supreme Court has adopted such a broad and vague application of the standards governing the decision to override a jury's life verdict so as to violate the Fifth, Seventh, Eighth, and Fourteenth Amendments?

III. Whether a trial judge's override of a jury's factually based decision against the imposition of the death penalty violates, in all cases, the Fifth, Seventh, and Fourteenth Amendments?



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# AUTHORITIES CITED

<u>CASES CITED</u>	<u>PAGE</u>
Andres v. United States, 333 U.S. 740 (1948)	27
Barfield v. State, 402 So.2d 377 (Fla. 1981)	11
Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983)	12,21
Beck v. Alabama, 447 U.S. 625 (1980)	passim
Brown v. State, 367 So.2d 6616 (Fla. 1979)	11
Buckrem v. State, 355 So.2d 111 (Fla. 1978)	11
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Burch v. State, 343 So.2d 831 (Fla. 1977)	11
Chambers v. State, 339 So.2d 204 (Fla. 1976)	11
Coker v. Georgia, 433 U.S. 584 (1978)	27
Dobbert v. Florida, 432 U.S. 282 (1977)	12,22,24
Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 910 (1980)	11
Douglas v. State, 328 So.2d 18 (Fla.), cert. denied 429 U.S. 871 (1976)	11
Douglas v. Wainwright, ___ F.2d ___ (11th Cir. 1983)	24
Duncan v. Louisiana, 391 U.S. 145 (1968)	28,29
Elledge v. State, 346 So.2d 998 (1977)	15
Furman v. Georgia, 408 U.S. 238 (1972)	22,25,26
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Holloway v. Florida, 449 U.S. 905	9
Hopper v. Evans, 456 U.S. 6095 1(1982)	7
Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978)	11
Johnson v. State, 393 So.2d 1069 (Fla. 1980) cert. denied, ___ U.S. ___, 102 S.Ct. 364 (1981)	11
Jones v. State, 332 So.2d 615 (Fla. 1976)	11
Keeble v. United States, 412 U.S. 205 (1973)	8
Lockett v. Ohio, 438 U.S. 586 (1978)	25,26
Malloy v. State, 382 So.2d 1190 (Fla. 1978)	11
McKennon v. State, 403 So.2d 389 (Fla. 1981)	11
Messer v. State, 330 So.2d 137 (Fla. 1976)	22
Miller v. State, 332 So.2d 65 (Fla. 1976)	23

Neary v. State, 384 So.2d 881 (Fla. 1980)	11
People v. Fitzpatrick, 308 NYS 2d 18 (1970)	27
Phippen v. State, 389 So.2d 991 (Fla. 1980)	11
Proffitt v. Florida, 428 U.S. 242 (1976)	passim
Provence v. State, 337 So.2d 783 (Fla.) cert. denied 431 U.S. 969 (1976)	11
Richardson v. State, ___ So.2d ___ (slip op. 8 FLW 327 (Fla. 1976)	22
Roberts v. Louisiana, 428 U.S. 325 (1976)	27
Shue v. State, 366 So.2d 387 (Fla. 1978)	11
Smith v. State, 403 Fla. 2d 933 (Fla. 1981)	11
Spaziano v. Florida, 454 U.S. 1037 (1981)	5,9,10
Spaziano v. State, 433 So.2d 508 (1983)	4,5
Spaziano v. State, 393 So.2d 1119 (Fla. 1981)	2,4,6
State v. Dixon, 283 So.2d 1 (1973)	22
Tedder v. State, 322 So.2d 908 (Fla. 1975)	passim
White v. State, 403 So.2d 331 (Fla. 1981)(	11
Witherspoon v. Illinois, 391 U.S. 510 (1968)	25,27
Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1739 (1982)	11
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<u>Other Authorities</u>	
Comment, <u>Jury Discretion and the Unitary Trial Procedure in Capital Cases</u> , 26 Ark. L. Rev. 33 33, 52-53 (1972)	30
<u>The Courts, President's Commission on Law Enforcement and Administration of Justice: Task Force Report, p. 26</u>	29
S. Gillers, <u>Deciding Who Dies</u> , 129 U. Penn. L.	29
Kalven and Zeisel, <u>The American Jury</u> p. 445 (1966)	29
La Font <u>Assessment of Punishment -- A Judge or Jury Function</u> , 38 Texas L. Rev. 834, 838 (1960)	29
Liebman and Shepard, <u>Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor</u> , 66 Georgetown L.J. 757, 819 (1978)	29
Mannheim, <u>The Capital Punishment cases: A Criticism of Judicial Method</u> , 12 Loyola of Los Angeles L. Rev. 85, 107-8 and 131 (1978)	29
A.L.I., <u>Model Penal Code</u> , §210.6 and Commentary at 133 (P.O.D. 1962)	30

Note, <u>Jury Sentencing in Virginia</u> , 53 Virg. L. Rev. 968, 969 (1967)	29
<u>Report of the Royal Commission on Capital Punishment, 1571 (1949-1953)</u>	29
Rubin, <u>The Law of Criminal Correction</u> , p. 375	29
Shapiro, <u>First Degree Murder Statutes and Capital Sentencing Procedures</u> , 24 Loyola L. Rev. 709 736 and 743-747 (1978)	30
<u>Symposium on Capital Punishment</u> , 7 N.Y.L. Forum 249, 312-313 (1961)	30
Togman, <u>The Two-Third System in Capital Cases</u> , 39 N.Y.U.L. Rev. 50, 75 (1964)	28,30
Wollan, <u>The Death Penalty After Furman</u> , 1974 Crim. Justice Systems Rev. 213, 2309	30

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1983

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JOSEPH ROBERT SPAZIANO,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

=====

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on May 26, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 50,250, is reported at 433 So.2d 508 (Fla. 1983) and is set out in Appendix A. The prior opinion of the Florida Supreme Court affirming petitioner's conviction, but vacating his death sentence, is reported as Spaziano v. State, 393 So.2d 1119 (Fla. 1981), cert. denied, 454 U.S. 1037 (1981).

JURISDICTION

The judgment of the Supreme Court of Florida was filed on May 26, 1983, and rehearing was denied on July 13, 1983. See Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file this petition to and including October 11, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence". Because of its length, the statute is set out in its entirety in Appendix C.

This case also involves:

SECTION 932.465, FLORIDA STATUTES (1973)

Limitation of prosecutions.

(1) A prosecution for an offense punishable by death may be commenced at any time. (2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period has elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

RULE 3.490, FLORIDA RULES OF CRIMINAL PROCEDURE

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

STATEMENT OF THE CASE

On September 12, 1975, the prosecution against Joseph Robert Spaziano was commenced by the filing of an indictment for the capital felony of first degree murder for the killing of Laura Harberts alleged to have occurred on or about August 6, 1973 (T 1-2)<sup>1</sup>.

Because the weakness of the state's case of first degree murder is relevant to an issue raised on this petition, that evidence will be discussed in some detail elsewhere in this petition. Briefly, the evidence revealed the following. On August 21, 1973, the decomposing corpse of a young woman was

<sup>1</sup> The symbols "T" and "R" respectively will be used herein to refer to the transcript of trial proceedings and the record-on-appeal in the Florida Supreme Court below.



discovered in a garbage dump in Seminole County, Florida. The deceased was identified, by dental records, as Laura Harberts, last seen alive, by her roommate, on August 5, 1973. The roommate testified that Ms. Harberts was dating a man named "Joe" and that the deceased and "Joe" had spoken by telephone on August 5th. The roommate also testified that she had met petitioner sometime in July, in the apartment that she shared with Ms. Harberts.

The state's chief witness was Anthony Dilisio. Dilisio, who was sixteen years old at the time of the events in question, testified that he accompanied petitioner to a dump. The ostensible reason for the excursion, according to Dilisio, was so petitioner could show him some of the women that petitioner had raped and tortured. Dilisio testified that he saw two female bodies situated in the dump. He did not report what he had seen to the police.

Dilisio admitted on cross examination that he regularly used L.S.D. and other drugs before the trip to the dump. Further, Dilisio stated in his deposition that he could not tell the authorities about the incident at the dump and the conversations with petitioner until after a session with a police hypnotist (R 80). Dilisio could not recall whether the hypnotist or the police suggested facts about his experience (R 82-85).

The Seminole County Medical Examiner testified that he conducted an autopsy the morning after the body was discovered (T 292). The doctor testified that the body was of a young adult female and was in an advanced stage of decomposition with half of the jaw separated from the skull (T 293). The doctor testified that an examination of the body revealed no evidence of trauma (T 294) and could not give an opinion as to the cause of death (T 298).

After the submission of evidence, outside the presence of the jury, the trial judge presented petitioner with the choice of waiving the statute of limitations which had run as to all lesser included noncapital offenses and having the jury instructed only as to first-degree murder. Petitioner chose the latter with the result that the jury was not permitted to consider verdicts of

guilt of lesser included, noncapital offenses (T 751-755). The jury, after deliberating more than five hours and after being given a "jury deadlocked" charge, returned a verdict of guilty of first-degree murder. The same jury recommended that petitioner be sentenced to life imprisonment, but that advisory verdict was overridden by the trial judge who sentenced petitioner to death. Thereafter, petitioner appealed his conviction and sentence to the Florida Supreme Court, which affirmed the conviction but reversed the death sentence for a violation of Gardner v. Florida, 430 U.S. 349 (1977), and remanded for a hearing before the trial judge. Spaziano v. State, 393 So.2d 1119 (Fla. 1981).

Petitioner then sought certiorari review by this Court of his conviction only. Certiorari was denied, but three Justices argued in dissent that this Court should grant plenary review to determine whether the trial court erred in refusing to instruct the jury on lesser included noncapital offenses. Spaziano v. Florida, 454 U.S. 1037 (1981).

A resentencing hearing was held on May 8, 1981 before a judge and without benefit of an advisory jury, pursuant to the Florida Supreme Court's limited remand. Despite the earlier jury verdict of life, petitioner was again sentenced to death.

Petitioner appealed his death sentence to the Florida Supreme Court, which affirmed. Spaziano v. State, 433 So.2d 508 (1983). Petitioner timely filed in this Court for certiorari review.



## REASONS FOR GRANTING THE WRIT

1. THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE BY THE FLORIDA SUPREME COURT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT MANDATE OF BECK V. ALABAMA WHERE THE JURY IN THIS CAPITAL PROSECUTION WAS PRECLUDED FROM CONSIDERING ANY LESSER INCLUDED OFFENSE TO CAPITAL HOMICIDE.

The issue presented here requires resolution by this Court for it is of major constitutional significance and was decided below in a manner inconsistent with this Court's pronouncements. The federal question directly involves the constitutional dangers addressed in Beck v. Alabama, 447 U.S. 625 (1980) because petitioner, just as Beck, was precluded by operation of law from having his jury consider any offenses less than capital homicide.

At the close of evidence in petitioner's case, the trial court required petitioner to choose between having the jury instructed only as to first-degree murder, or waiving the applicable statute of limitations with respect to the lesser included noncapital offenses of second degree murder, third degree murder and manslaughter. The statute had run on these latter offenses. Petitioner refused to waive the statute of limitations, and so the jury was not instructed on the possibility that petitioner might be guilty of a lesser offense. After several hours of deliberation and an "Allen" charge, the jury convicted petitioner of first degree murder. Following trial on penalty, the jury, after a short period of deliberations, recommended life imprisonment.

This case has been before this Court previously and certiorari was not granted, though three Justices felt that plenary review would have been appropriate. Spaziano v. Florida, 454 U.S. 1037. There is, however, a critical difference between the posture of the case then and its posture now. Now it is before the Court with petitioner having been sentenced to death and with that sentence having been affirmed by the Florida Supreme Court. Where petitioner had been before this Court only for review of his conviction since the Florida Supreme Court had vacated his death sentence, he is now seeking review of the reimposed sentence of death. Thus, now this case is before this Court as

a death case, and it is a death case precisely because the trial court gave the jury only two options at the guilt stage: conviction of first degree murder or acquittal. The jury's sole safeguard against the overall weakness of the state's evidence was its advisory verdict of life imprisonment; the court's refusal to instruct on lessers eliminated any other such safeguards. This new posture brings the issue presented within the Eighth Amendment standards of reliability enunciated by this Court in Beck v. Alabama, supra.

The Florida Supreme Court, however, did not view this case as being at all affected by Beck. In affirming petitioner's conviction, that court held that:

... the Beck v. Alabama decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of Beck v. Alabama may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

Spaziano v. State, 393 So.2d 1119, 1122 (Fla. 1981). Following remand and reimposition of the death sentence, the Florida Supreme Court did not discuss petitioner's contention that the trial court's overriding the jury's life verdict was improper because of the factors identified in Beck.

The Florida Supreme Court's attempted distinction of this Court's holding in Beck on the reasoning that this case involves a failure to instruct on lesser offenses based on the operation of a statute of limitations rather than an "express statutory prohibition," represents a distinction without a difference. This is so because the result is identical: there is a risk of unreliability that is intolerable under the Eighth Amendment. The facts of this case embody the constitutional hazards identified by this Court in Beck despite the lower court's attempt to find a legal distinction.

The dangers sought to be averted by Beck's holding quite apparently came true in the present case. The jury, which had considerable difficulty in reaching a verdict on guilt after a

number of hours of deliberation interrupted with judicial inquiry, reported deadlock and an "Allen" charge, had little difficulty in issuing an almost immediate sentencing verdict of life imprisonment. The evidence supporting guilt was at best inconclusive -- there was virtually no evidence as to the degree of the homicide and only weak circumstantial evidence that petitioner was actually involved in the offense (see Point II, infra, at 17 for a detailed discussion of the evidence) -- yet the jury was faced with a murder that was portrayed as brutal and with only two options: guilty of first degree murder or not guilty. The jury did not have the "third option" mandated by Beck. Under these circumstances the jury exercised the only reasonable option it had available: it found petitioner guilty of first degree murder but issued a sentencing verdict of life imprisonment. This life verdict, however, was overridden by the trial judge who imposed the death sentence on petitioner. The Florida Supreme Court affirmed the death sentence.

Accordingly, the danger of unreliability came true in this case. The trial judge's instruction presented an impossible dilemma to the jury, a jury confronted with flimsy evidence of first degree murder. The refusal to instruct on lesser offenses prevented the jury from finding petitioner guilty of a lesser offense, which it had the exclusive right to do and for which there was a reasonable construction of the evidence. For example, the jury might well have believed that petitioner was somehow involved and knew about the homicide yet found the evidence insufficient to support the essential element of premeditation.<sup>2</sup> Since there were no lessers, the jury should have acquitted, yet, as this Court has recognized, where a defendant is guilty of some offense the jury is more likely to resolve its doubts in favor of conviction. Petitioner's jury had

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<sup>2</sup> It is this lack of direct evidence and inconclusive character of the evidence that distinguishes this case from the situation present in Hopper v. Evans, 456 U.S. 605 (1982). Since there was no direct evidence as to the manner or cause of death, the jury quite easily (and probably) could have determined that the State failed in its burden to prove the mental element beyond a reasonable doubt. Thus, a verdict for a lesser offense, involving a lesser mental element, would be perfectly justified.

degree murder: to find petitioner guilty but to recommend life. That is exactly what his jury did.

This Court has held that failure to instruct on lesser-included offenses distorts the jury's factfinding and deliberative process in precisely the manner asserted by petitioner. In Keeble v. United States, 412 U.S. 205 (1973), the Court addressed the question of whether the Major Crimes of Act of 1885 should be construed to prohibit a jury instruction on a lesser included offense where the lesser included offense was not one of the crimes enumerated in the Act. This Court reversed the defendant's conviction for the greater offense holding that the defendant was entitled to an instruction on a lesser offense even though there was no jurisdiction to try him on the lesser offense. The value of such a safeguard was explained:

... if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. at 212-213 (Emphasis in original).

Applying the principles articulated in Keeble to a capital sentencing proceeding, this Court in Beck v. Alabama, 447 U.S. 625 (1980) held that the death sentence may not constitutionally be imposed where the jury was not permitted to consider a verdict of guilty of a lesser included offense. As in Keeble, the Beck opinion stressed that providing the jury with the less drastic option of conviction on a lesser included offense "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard" Id. at 635. The Court made clear that when the evidence establishes that the defendant is guilty of "a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of conviction of a lesser included offense would seem inevitably to enhance the



tolerated in a case in which the defendant's life is at stake." Id. at 638.

In Holloway v. Florida, 449 U.S. 905 (1980) [a noncapital case], Justice Blackmun, dissenting from the denial of certiorari, observed that "the Court more than once has expressed the understanding that a lesser included offense option minimizes the risk of undermining the reasonable doubt standard." Id. at 908. He concluded that:

The Court's decisions in both Keeble and Beck imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential fact-finding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, legal matter with which the factfinder need have no concern.

Id. at 909. Justice Blackmun reiterated these concerns in his dissent from denial of certiorari as to petitioner's conviction. Spaziano v. Florida, supra, 454 U.S. at \_\_\_, 102 S.Ct. at 283.

The evils identified in the cases discussed above were clearly present here and their invidious impact was not offset by the fact that the statute of limitations had run as to the lessers. Justice Marshall observed in his dissent from the denial of certiorari as to the conviction in this case:

The principles underlying Keeble and Beck would seem to apply with just as much force where the statute of limitations on the lesser-included offenses has run. Those cases focused on the danger of an unwarranted conviction, where the jury was given only a choice between acquittal and conviction for the offense charged, and was not given the opportunity to consider whether the defendant was guilty of some lesser-included offense. This danger exists even where the statute of limitations has run with respect to the lesser offense. Thus, I think a strong argument can be made that the jury should be instructed as to that offense.

A criminal defendant should not be penalized because the state did not bring him to trial within the time prescribed by the state legislature for lesser-included offenses. After receiving instructions on both the offense charged and the lesser-included offenses, the jury may render a guilty verdict on a lesser offense. Such a verdict would reflect the jury's conclusion that, although it believed beyond a reasonable doubt that the defendant was guilty of criminal conduct, it had a reasonable doubt as to whether the state had proved each element of the offense charged. At this point the court must decide as a matter

the lesser crime. The court should not be permitted to avoid this legal question by refusing to allow the jury to decide whether the defendant is guilty only of a lesser offense.

Spaziano v. Florida, supra, (Marshall, J., dissenting).<sup>3</sup>

The facts of this case, while unique in their extremity, place clear focus upon the constitutional question presented. Because the jury issued a verdict of life imprisonment rather than death, coupled with the general weakness of the evidence, this case presents a significant Eighth Amendment question. The context of this case places that question in a critical constitutional posture since it carries with it and embodies the inherent hazards identified explicitly by this Court in Beck v. Alabama, supra. The issues have been fully raised and decided in the courts below and are thus appropriate for this Court's plenary review at this time. The jury's verdict in this case was reasonable and thus serve as a stark witness to the evil-come-true of Beck. The death sentence thus is constitutionally improper and cannot stand.

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<sup>3</sup> Since the judgment of conviction of the petitioner by the trial court involves the adjudication of petitioner and the statute of limitation specifically governs this adjudication process, the consideration of the statute of limitations (except when factual issues are presented) is not for the jury and should have no effect upon the instructions which guide them in reaching its verdict. It is this very reason that a trial court does not instruct the jury that he may withhold adjudication following a determination of guilt by the jury.

The opportunity for prosecutorial abuse is painfully apparent. Given the recognition in both Keeble and Beck that, although in theory the jury must acquit where the state has failed to prove all the elements of the charged offense and there are no lessers, in fact the jury is likely to resolve any doubts in favor of conviction; an ill-motivated prosecutor could in a case where the defendant may have actually committed homicide of a lesser degree wait until the statute of limitations had run and substantially increase the possibility that the defendant will be convicted of the higher charged offense. In fact it is interesting to note that the statute of limitations ran in this case only a month before the indictment was filed, an ironic fact that serves to highlight the unfairness to petitioner.

Florida trial courts override jury life recommendations with some frequency. Because the issues raised in this petition have reoccurred in the past and will continue to reoccur in future cases,<sup>4</sup> this this Court should grant certiorari.

Even assuming that Beck v. Alabama, supra, were not held to apply to preclude the death sentence in this case as a matter of law, a further issue of constitutional dimension is presented. That issue concerns the appropriate constitutional standards that must govern a judicial decision to overrule a jury's life verdict in Florida. The question presented in this case is whether definition and application of the jury override should be left solely to state law or whether the override is limited by the United States Constitution. That question is especially crucial where, as here, the decision to override the jury implicates the serious dangers of unreliability identified in Beck. Petitioner will show that this Court's approval of Florida's override strongly suggests that certain procedural safeguards, adopted by the Florida Supreme Court but not followed in this case, are integral to the constitutionality of the override authority. In effect, this Court's approval of the override has been properly

<sup>4</sup> See, e.g., Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1037 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied \_\_\_ U.S. \_\_\_, 102 S.Ct. 1739 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 364 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odum v. State, 403 Fla. 1d 936 (Fla. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1970 (1982); McKennon v. State, 403 So.2d 389 (Fla. 1981); Smith v. State, 403 Fla. 2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (1976); Provence v. State, 337 So.2d 783 (Fla.), cert. denied, 431 U.S. 969 (1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975).

principle that would bring the override within the ambit of constitutional acceptability. Although such a limiting principle is in part a matter of "state law", failure to follow that principle in this case resulted in deprivation of fundamental rights guaranteed of the federal Constitution.

A. This Case Presents a Significant Federal Question

This Court has suggested that Florida's jury override is constitutional on its face. See Barclay v. Florida, \_\_\_ U.S. \_\_\_, \_\_\_, \_\_\_, 103 S.Ct. 3418, 3425, 3427, 3428 (1983); id. at \_\_\_, 103 S.Ct. at 3426-3427 (Stevens, J., concurring); Dobbert v. Florida, 432 U.S. 282, 295 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). This Court's initial approval of the override was not, however, unqualified; it was contingent upon Florida's adherence to certain procedures governing administration of the override.

In evaluating this Court's facial acceptance of the override it is necessary to identify precisely what it is that makes Florida's procedure constitutional. In every case where this Court has had occasion to pass on the override, its approval has been based, in large measure, upon the procedural protections with which Florida has clothed its system. This Court in Proffitt v. Florida and Barclay v. Florida quoted with approval the principle adopted by the Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975): "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." See Proffitt v. Florida, 428 U.S. at 250; Barclay v. Florida, \_\_\_ U.S. at \_\_\_, 103 S.Ct. at 3425, 3427. More significantly, in Dobbert v. Florida, this Court described the "exacting standards of Tedder" as being a "crucial protection" that is "most important" to the capital punishment statute of Florida. 432 U.S. at 296.



violation of Tedder in this case directly implicates rights protected by the United States Constitution. Decisions by this Court approving the jury override strongly suggest that without Tedder the override would create serious constitutional difficulties. Implicit in this Court's decision that a particular state procedure will satisfy constitutional requirements is the crucial assumption that the state will follow that procedure. In capital cases, it is precisely the clearly defined existence of and adherence to the state procedural rules that qualifies a sentencing decision as nonarbitrary and thus constitutionally permissible.

This Court validated a specific procedural scheme when it approved the override in Proffitt. Because the limitations imposed by Tedder make the override constitutional, ignoring these limitations implicates the Constitution. Failure to abide by Tedder would result in the arbitrary imposition of the death penalty in violation of the Eighth amendment. Having stated in Tedder that it will reject only those jury life recommendations that are utterly unreasonable, Florida must adhere to that standard.

The constitutional analysis urged by petitioner is strikingly similar to that employed by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). The issue in Godfrey was whether the aggravating circumstance delineated in Georgia Code. Ann. §17-10-30(b)(7), upon which Godfrey's death sentence was based, was applied in an unconstitutionally vague, overbroad and ambiguous manner. The Godfrey Court noted that it previously had said that subsection (b)(7) was vague on its face but there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" of the statutory provision. Gregg v. Georgia, 428 U.S. 113, 201 (1976). In Godfrey, this Court concluded that the Georgia Supreme Court had in fact placed a narrowing gloss on the statute and that such a reading made the aggravating circumstance constitutionally acceptable. 446 U.S. at 431. But because in Godfrey's case the Georgia Supreme Court failed to apply its limiting construction of the (b)(7) aggra-

Court has thus recognized that in evaluating state procedures designed to meet the mandates of the Eighth Amendment, the line between "federal law" and "state law" is at times difficult to discern.

Similarly, if Florida's override is constitutional, it is so only by virtue of Tedder. In the present case, however, Tedder was not followed. The lower courts failed to follow the Tedder standard in overriding and in approval of that override by omission of any consideration of the reasonableness of the jury's life verdict. Neither the state trial judge who overrode the jury nor the Florida Supreme Court that affirmed the sentence found that "virtually no reasonable person could differ" over the necessity of the death penalty in this case. Instead the courts simply found that there were facts that supported the imposition of death. By ignoring the reasonable bases for the jury's verdict, the Florida Supreme Court has inconsistently applied its jury override standards, resulting in such a vague and overbroad construction so as to violate settled constitutional precepts. The jury's life verdict in this case was reasonable, and hence the imposition of death, over that reasonable jury verdict, violated the Eighth Amendment. As petitioner demonstrates below, reasonable persons could and did differ over whether Joseph Spaziano should live or die.

B. The Jury's Sentencing Verdict of Life Imprisonment Was Reasonable

The jury's verdict was eminently reasonable under the unique circumstances of this case where (1) the jury was not given the "third option" of considering lesser included offenses; and (2) the evidence of guilt was inconclusive as to the degree of homicide that had occurred and was weak even as to whether

are set out below in some detail in order to show their viability in this case.

1. The Lack of Instructions on Lesser-Included Offenses

As discussed in Point I, supra, the jury in this case was not given the opportunity to consider any lesser offenses to first degree murder because it was determined that the statute of limitations had run as to those lesser offenses. This posed a dilemma for a jury faced with an offense portrayed as brutal, but supported only by inconclusive evidence, with guilty of first degree murder or not guilty as its only options. The hazards of such a dilemma in capital cases forecasted by this Court in Beck were realized in this case. That the lack of the "third option" affected the jury's decision-making process is evidenced clearly by the circumstances of the jury's deliberations.

The jury in petitioner's case had great difficulty in reaching a verdict on guilt -- obviously because of the very weak proof of first degree murder that had been offered. The jury deliberated a total of five hours over a span of time beginning late in the afternoon and continuing until 11:00 p.m. The chronology of the deliberations is instructive:

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6 Though petitioner focuses in this discussion upon the lack of instructions and the weakness of the evidence, there is further support for the reasonableness of the jury's verdict from the existence of substantial mitigating evidence. Some of this evidence was summarized by the dissenting opinion below, 433 So.2d at 512. Also, in the judge's first sentencing order, prior to the remand, the judge had found the statutory mitigating circumstance of petitioner's age. In the judge's current sentencing order the judge did not delineate the mitigating factors he considered, but rather simply stated that "the mitigating circumstances are insufficient to outweigh such aggravating circumstances..." (R 201). As the Florida Supreme Court has recognized: "In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) (emphasis in original). Accordingly, the jury's verdict is reasonable for the additional reason that it was supported by mitigating factors present in the case.

810	Jurors brought back to inquire about dinner	6:28 P.M.
811-812	Jurors decide to continue deliberating	6:30 P.M.
813	Court receives word jury is having trouble reaching a unanimous verdict. Court sends jury to dinner.	8:29 P.M.
815	Jury returns from dinner. Court inquires of foreman whether "if given more time there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so."	9:57 P.M.
815-816	Jury requests additional time and continues to deliberate	9:59 P.M.
817	Jury brought back. Court inquires of foreman whether or not jury would be able to reach a verdict. Foreman replies, "At this point, Your Honor, I don't believe so."	10:56 P.M.
817-819	Court gives jury deadlock charge over objection. Court recesses for not longer than half an hour	
818	Jury retires and continues their deliberations	10:29 P.M.
819-820	Court orders jury returned. Court receives word that jury wants five more minutes	11:03 P.M.
820	Jury returns with verdict	11:07 P.M.

By contrast, the jurors deliberated only a short time before returning their life recommendation. Unlike guilt/innocence, the jurors had no difficulty in reaching agreement on the appropriate sentence. The jury apparently felt that although the evidence may have been sufficient to convict, it was insufficient to warrant imposition of the most extreme penalty. This circumstance is Beck brought to reality.

however, lies in the weakness of the evidence. Because the weakness of evidence of first degree murder explains the reasonableness of the jury's verdict, that evidence must be discussed in some detail.

2. Weakness of Evidence of First Degree Murder.

In the present case, the evidence as to degree of the offense is virtually absent; the evidence is extremely weak even as to whether petitioner was involved in the death at all. The State relied primarily on the testimony of Tony Dilisio to obtain the conviction. Aside from Dilisio the evidence consisted of testimony of two of the deceased's friends and testimony of two individuals who had known petitioner. The evidence was entirely circumstantial regarding petitioner's involvement in the alleged offense. Not only was there no direct evidence linking petitioner to the alleged crime, there was also no direct evidence that a crime necessarily had been committed.

The State attempted to prove through the testimony of Beverly Fink and Jack Mallen, the deceased's roommate and the roommate's boyfriend, that petitioner knew the deceased prior to her death. Both witnesses testified that an individual they identified as petitioner came to the door of the apartment sometime in July and asked to see the decedent (T 401-402, 467-468). However, they identified that individual, who said he was a traveling cook, to be petitioner from a suggestive photographic lineup. See States Exhibit 7. Ms. Fink also testified that the deceased was dating several individuals, one of whom was named "Joe", but none of whom was petitioner (T 408-409, 410-411, 437). In addition, William Coppick and Mike Ellis testified that approximately two years prior to the alleged incident, petitioner lived in a trailer in the same general area where the deceased's body was found. Mr. Coppick also testified that petitioner told him about finding some bones, but never said where or exactly when the alleged conversation took place (T 563, 572). Mr. Ellis further stated that petitioner took him to the general area where



get some marijuana "stashed" there (T 599-600, 602-603). Again, Mr. Ellis was unsure of the date when this took place. Other than this testimony, the State relied on the testimony of the 16-year-old Dilisio.

Dilisio did not testify that he was present or that he otherwise had personal knowledge of the offense itself. Rather, he only related what petitioner purportedly told him about the crime and he supposedly saw of the scene weeks later. Dilisio said that petitioner took him to an area where Dilisio observed two bodies (T 631). Prior to this, Dilisio claimed petitioner had told him about various things he had done to "some girls" (T 626-627). Dilisio testified he never believed petitioner and that he thought petitioner was bragging to impress him (T 627-628). Dilisio further indicated that he idolized petitioner and wanted to ride motorcycles with him (T 639, 689-690). Finally, Dilisio stated he did not report what he had seen because he wanted to be an Outlaw (T 689).

The testimony of Tony Dilisio was unworthy of belief for several reasons. First, Dilisio had a motive to lie. Dilisio testified in his deposition that he believed that petitioner had "raped" his stepmother (R 49-50). It was precisely because of that supposed incident that Dilisio broke off his relationship with petitioner. Secondly, according to his father, Dilisio had a tendency to exaggerate the truth, although not to the point of being an "extreme" pathological liar (R 182). Dilisio's belief in petitioner's involvement with his stepmother alone provided Dilisio with enough incentive to strike out against the very individual he sought to emulate.

Thirdly, Dilisio was an admitted drug user before, during and after the alleged incident at the dump. Dilisio admitted to using L.S.D., smoking marijuana, ingesting cocaine and taking all sorts of drugs, except heroin (T 655-656). Dilisio also admitted that while on L.S.D. he sometimes hallucinated, fantasized, saw things that did not exist, saw distortions and forgot things that

stated he combined marijuana and L.S.D. often, which resulted in an accelerated hallucinogenic experience (T 661-662).

Perhaps the single most important factor detracting from Dilisio's credibility was the fact that he never testified about the alleged incident at the dump until after he went to a hypnotist (R 80). Dilisio indicated in his deposition that he was questioned by the police several times without mentioning the alleged incident. It was only after hypnotism that his memory "returned." Dilisio stated he could not remember whether the hypnotist used mind-relaxing drugs, nor, perhaps more importantly, could he recall whether the hypnotist or the police suggested anything to him while under hypnosis (R 82-85). It also must be considered that when Dilisio was first approached by the police and at the time of several of the initial interviews, Dilisio was in detention and at a halfway house (R 74-79). Yet, subsequent to the hypnotic session and his revelations, when his deposition was taken Dilisio testified he was on probation (R 47). Further, Dilisio gave several inconsistent statements regarding the location of the bodies he allegedly saw and the route taken to arrive there. His testimony differed on direct and cross examination from the description he gave at the deposition.

The cumulative effect of the foregoing circumstances is that the testimony given by Dilisio is replete with inconsistencies, is unsatisfactory and insubstantial, and thus totally unworthy of belief. That without Dilisio the State would not have been able to prove petitioner's involvement at all was admitted by the prosecutor during argument on petitioner's motion to exclude the testimony of Dilisio's father (T 614).

If Dilisio's testimony had been rejected in whole or in part, as being unworthy of belief then clearly the State did not meet its burden of proving that petitioner committed premeditated murder. Even if Dilisio's testimony were believable, the evidence was still circumstantial and insufficient. Several reasonable hypotheses of innocence are apparent from the record. First, as both Dilisio and his father indicated, petitioner could

mere fact [if a fact at all] that petitioner took Dilisio to view a body does not mean that petitioner killed the person or knew who did. There is absolutely no corroboration of Dilisio's testimony as to who killed the deceased, or even how she died.

Secondly, there is a reasonable hypothesis apparent in the record that someone else killed the deceased. Both Ms. Fink and Mr. Mallen testified the deceased was afraid of a couple she met immediately before her disappearance. Both indicated that the deceased told them that the couple talked about "group sex". And, specifically, Ms. Fink stated that the deceased had become frightened when the couple began driving off back roads and talking about sex (T 429). Thus, again, the evidence does not conclusively point only to petitioner. Rather, it is evident that others had an opportunity and, apparently, a motive. Clearly the State did not establish a motive on petitioner's part.

Thirdly, there is the reasonable hypothesis that Dilisio lied or imagined the bodies while hallucinating. In the present case, Dilisio's father indicated that although he would not say his son was an "extreme pathological liar", he did say Dilisio exaggerated the truth (R 182). And Dilisio had a motive to lie as petitioner, according to Dilisio, had raped his stepmother

. Fourthly, there exists a reasonable hypothesis of innocence that Dilisio's sudden return of memory after a session with a hypnotist was a product of suggestion by either the hypnotist or the police in conjunction with mind-relaxing drugs normally used in hypnosis.

Finally, even had the jury believed that petitioner were somehow involved, the jury could have believed the evidence to be insufficient to prove premeditation beyond a reasonable doubt.

Thus the weakness of the State's evidence, combined with the jury's difficulty in reaching a guilty verdict and its ease in reaching a life recommendation, strongly suggest that it did in fact believe that petitioner was guilty of an offense less than first degree murder. But the judge's instruction prevented the jury from acting on that belief. The jury's only safeguard against the overall weakness of the evidence was its advisory



instruct on the lesser degrees of homicide, it cannot be concluded that the jury's life verdict was unreasonable. In fact, the constraints placed upon the jury by the trial judge rendered "guilty, but life" the most reasonable verdict the jury could have given on the basis of the evidence. The trial judge's override of that reasonable recommendation was an error of constitutional magnitude.

3. Overriding the Jury's Reasonable Verdict of Life, cannot be justified by Reliance upon Aggravating Circumstances Based on Evidence Not Before the Jury.

The sentencing judge's decision to override the jury's recommendation may have been grounded upon his consideration of evidence not presented to the jury. Such a basis for overruling a reasonable jury verdict would, however, be improper. While the judge could properly use evidence not before the jury to rebut a mitigating circumstance asserted by a defendant, see Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. at 3426-3427 (Stevens, J., concurring), it was improper to use such evidence as the sole basis of an aggravating circumstance not found by the jury.

The trial court found, as an aggravating circumstance, that petitioner had previously been convicted of felonies involving the use or threat of violence. Fla. Stat. §921.141(5)(b). The finding was based on evidence, offered by the state, that petitioner had committed another offense in August, 1975. The court ruled the prior conviction inadmissible at the penalty phase; thus, it can fairly be said that the court's decision to overrule the jury's reasonable life recommendation was based upon evidence not presented to the jury.

Florida's system of jury override mandates that all evidence forming the sole basis of an aggravating circumstance be presented to the triers of fact during the advisory sentencing proceeding. For the scheme approved in Proffitt and Dobbert to function fairly, judge and jury must rely on the same evidence in aggravation in performing their weighing functions. State v. Dixon, 283 So.2d 1, 8 (Fla. 1983). When a judge relies on evidence in aggravation which was not considered by the trial

jury and uses it to override the jury's reasonable finding of life, the statutory guidelines designed to eliminate the arbitrariness identified in Furman v. Georgia, 408 U.S. 238 (1972) cannot operate as intended.

Further, the potential for prosecutorial abuse of the procedure used in this case is impressive. Allowing a judge to consider in aggravation materials not before the jury would encourage prosecutors to "sandbag" defendants by holding back certain evidence in case the jury returned an advisory verdict of life with the hope of persuading the judge to overrule the jury. Such tactics by defense lawyers have, in recent years, increasingly drawn this Court's ire.

The Florida Supreme Court appears to acknowledge that the jury must be given access to all evidence forming the basis of aggravating circumstances. The Florida Supreme Court, in Richardson v. State, \_\_\_ So.2d \_\_\_, \_\_\_ [slip opinion 8 Fla. L. W. 327, 328] (September 9, 1983), recently held that it "cannot condone a proceeding which, even subtly, detracts from comprehensive consideration" by the jury of evidence relevant to aggravation and mitigation. The trial judge had overridden the jury's life recommendation because the jury "did not have the benefit of all of the evidence." Id. The state Supreme Court reversed the trial judge's override, stating that it could not "countenance the derogation of the jury's role implicit in (the trial court's rejection of the life recommendation." Id. In Messer v. State, 330 So.2d 137 (Fla. 1976), the trial judge excluded from the jury sentencing proceeding evidence tending to show that the defendant was suffering from a mental or emotional disturbance at the time of the offense. The Florida Supreme Court, in invalidating the death sentence, rejected the trial judge's reasoning that he could himself consider the psychiatric reports before actually imposing sentence. The Florida Supreme Court reached a similar result in Miller v. State, 332 So.2d 65 (Fla. 1976). The defendant in Miller sought a continuance before the sentencing hearing to secure the attendance of psychiatrists. The trial judge denied the continuance on the ground that he

could consider the opinions of the mental health experts after the jury rendered its advisory opinion. The Florida Supreme Court invalidated the death sentence.

Because of the "great weight" to be given a jury's recommendation of life, the Florida Supreme Court in Tedder held that "(i)n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. From this it must follow that the judge , in overruling a jury's reasonable recommendation of life, cannot base an aggravating circumstance solely upon evidence not before the jury.

C.Conclusion: The Jury, Not the Judge, Acted Reasonably and Constitutionally

By failing to instruct the jury on the lesser degree offenses, the jury was placed in a position identical to that of the juries in Beck and Keeble. There was substantial doubt raised by the State's case as to the guilt of petitioner for the crime charged. Yet, the jury was understandably unwilling to risk the chance that petitioner might in fact be guilty. The verdict unequivocally establishes that this dilemma in the juror's minds was resolved in favor of guilt as opposed to acquittal as this Court predicted in Beck that it would. Had the jury been allowed to consider verdicts of lesser degrees, then its essential fact-finding function would have been preserved. Instead petitioner's jury was left with only one safeguard against an erroneous decision -- it very quickly recommended life as the appropriate punishment.

Petitioner's jury acted reasonably in recommending life over death. Confronted with two equally implausible yet exclusive options, and with an extremely weak case of guilt, the jury did the only reasonable thing it could do: it found petitioner guilty but recommended life imprisonment.

It is perhaps significant that neither the Florida Supreme Court nor the state trial court, in approving petitioner's death sentence, made the finding required by Tedder that "virtually no

reasonable person could differ" over the necessity of a death sentence. The Florida Supreme Court held that "the facts suggesting the death sentence be imposed... meets the clear and convincing test to allow override of the jury's recommendation." (emphasis added). This test is quite different from Tedder and suggests that the Florida courts were aware that Tedder was not met in this case. Reasonable people could and did differ over the fate of Joseph Robert Spaziano.

III. A TRIAL JUDGE'S OVERRIDING A JURY'S FACTUALLY BASED DECISION AGAINST THE DEATH PENALTY MUST, IN ALL CASES, VIOLATE THE FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner argued above that the jury override was unconstitutionally applied in this case. But the difficulties in defining and administering the override, brought sharply into focus by petitioner's case, lead inevitably to a broader inquiry: is the override itself constitutional? Petitioner readily acknowledges that this Court has suggested that the override is constitutional. At least one lower court has read Proffitt, Dobbert and Barclay as foreclosing the matter. See Douglas v. Wainwright, \_\_\_ F.2d \_\_\_ (11th Cir. 1983). It is for that reason that only this Court can revisit the issue.

Petitioner respectfully asks this Court to reconsider the issue. Florida's jury override should be declared unconstitutional on its face for at least four reasons: the nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross-section of the community whose outrage is being expressed; for this reason, judges have no special expertise and in fact juries are the true "experts" on whether death is appropriate in any given case; the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, it is also contrary to the great weight of professional legal opinion.

Because Florida has chosen to involve a jury in deciding who dies, the life verdict of that jury should stand.

#### A. The Nature of the Decision on Death

Death is different, this Court has stated, for several reasons. Not only is this penalty irremediable, but the motive for its imposition differ from any other penalty permissible under our Constitution. Rehabilitation is irrelevant and incapacitation, while conceptually applicable, has never been emphasized as a goal of the death penalty. Deterrence is a matter of great importance to legislatures debating whether the death penalty is appropriate at all, but not to particular juries deliberating whether the penalty should be imposed in a given case. Retribution, petitioner would assert, is the primary goal of execution. This Court has recognized again and again that the death penalty represents a statement our society makes about the kind of people we are. An execution is a public testament of revulsion. See Furman v. Georgia, 408 U.S. at 453 (Powell, J., dissenting); Gregg v. Georgia, 428 U.S. at 184.

Because the death decision is a retributive one and because retribution is an expression of the will of the "community", a greater degree of reliability is achieved if the will of that body is expressed and followed. The kind of reliability discussed by this Court in cases such as Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978) refers to the accuracy of the decision to be retributive. A jury is substantially better able to convey the community's wish for retribution than is a single judge. The role of the jury in capital sentencing is to "maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a maturing society". Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). The Court's reference to this "link" is another way of saying that the jury's job is to speak the community's desire for retribution. And that is a job that only a jury can perform.

#### B. The Myth of Judicial Expertise in Capital Sentencing

One may accept the general proposition that jury sentencing is required to ascertain the "conscience of the community" and still argue that judicial sentencing is needed to foster con-



sistency among cases. This Court in Proffitt v. Florida observed that "judicial sentencing should lead to greater consistency ... since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252. Petitioner respectfully submits that this proposition is an inaccurate statement of the nature of the capital sentencing decision.

There is no way for a judge to equal what a jury can best bring to the capital sentencing process -- the community's view. Juries, properly chosen in accordance with law designed to assure that they reflect a fair cross-section of the community, are more likely to accurately reflect community values than are individual trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood and because judges collectively do not represent --by race, sex or economic or social status --the communities from which they come. This is the touchstone of the retributive impulse, and in this it is the jury, not the judge, which has the "expertise."

Further, this Court's concern with "individualization", expressed in Lockett renders questionable the theoretical relevance of "analogous" cases at the jury sentencing stage. Lockett emphasises the differences between people, their "uniqueness", 438 U.S. at 605, when it comes to capital sentencing.

Finally, consistency among cases need not occur at the judge-jury stage of the process. Consistency can and must be provided though the appellate review procedures approved by this Court in Proffitt. To the extent that different trial judges sentence similar defendants, they will predictably apply different standards in capital cases, just as they do now in noncapital cases.

#### C. National Practice

In testing the constitutional validity of death penalty procedures, this Court has often looked to the national legislative practice. See, e.g. Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Coker v. Georgia, 433 U.S. 584, 593-597 (1987); Beck

v. Alabama, 447 U.S. 625, 635-637 (1980). Such examination in this case reveals that the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, thus violating the "evolving standards of decency" identified by this Court in Gregg v. Georgia and Gardner v. Florida, 430 U.S. 349 (1977). Such overwhelming national rejection of a procedure for imposing the ultimate penalty must at the very least raise serious doubts about its constitutionality.

In 1948, only New York, Delaware and Utah sanctioned the practice of jury override, out of 42 jurisdictions (including federal) with discretionary capital punishment for murder.<sup>7</sup> By the time of Furman in 1972 only Delaware and Utah permitted such a procedure out of 41 capital murder jurisdictions (including federal and District of Columbia)<sup>8</sup>, New York having made a mercy decision by either the judge or the jury binding in 1963.<sup>9</sup>

Since the decision in Furman, of 32 jurisdictions (including federal) which have adopted "guided discretion" death penalty statutes with jury participation in the penalty phase, only Florida, Indiana and Alabama permit death sentences after jury decisions for life (see Appendix D). Moreover, only in Florida does it appear that such death sentences have actually been imposed and affirmed since Furman. As of May, 1981, no death sentences after jury life determinations had been imposed under the Indiana or Alabama statutes.

An additional indicator of unconstitutionality is the great rarity with which death sentences after jury mercy recommendations were actually imposed and executed under the pre-Furman Utah and New York laws. There were no executions in Delaware after 1949). All seven Utah executions during the period of

<sup>7</sup> See Andres v. United States, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertently, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 1940, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

<sup>8</sup> See Witherspoon v. Illinois, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. (See Appendix D).

<sup>9</sup> See People v. Fitzpatrick, 308 N.Y.S.2d 18, 22 (1970).

1948-1972 involved cases where the jury had refused to recommend life imprisonment; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix E for Utah cases). Commentators have also observed that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964), citing New York District Attorney's Association, Memorandum and Draft Bill (October 17, 1960).

Thus, at least since 1948, death sentences after jury decisions for life have been rare in legislative practice and yet rarer in application. This indication of unconstitutionality must be given great weight.

#### D. Professional Legal Opinion

This near-uniform consensus of the States that jury decisions against the death penalty should be final is in accord with professional legal opinion, another factor to be considered in due process questions concerning jury and death penalty practices.<sup>10</sup>

While this Court in Proffitt, 428 U.S. at 252 n. 10, cited sources to show that trial judges can play a useful role in capital sentencing, it did not appear to attempt to ascertain professional opinion on the imposition of a death sentence after a jury decision of life. Surveying the literature both before and after Furman, petitioner finds considerable agreement that jury participation is undesirable in noncapital sentencing but highly desirable if not constitutionally mandated in deciding life or death; that if a jury takes part in the penalty phase of a capital case, its verdict for life must be final; but a jury's decision for death may best be treated as a mere recommendation to the court.

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<sup>10</sup> See e.g. Gregg v. Georgia, supra, 428 U.S. at 189-195.



A major study endorsed by this Court in Duncan v. Louisiana, 391 U.S. 145 (1968), found a reasonable basis for judge/jury disagreements in capital penalty decisions.<sup>11</sup> This pattern holds true in Florida. See Appendix F. Further, even severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty.<sup>12</sup>

Special attention is called to the two sources directly cited by this Court in Proffitt, 428 U.S. 252 n., 109, which note with approval the prevailing practice of requiring a jury's consent for the death sentence but leaving noncapital sentencing to experienced judges alone.<sup>13</sup>

Since the 1976 death penalty decisions, some commentators have concluded that jury participation and consent in a death sentence (unless waived) is constitutionally required,<sup>14</sup> although it is not necessary to reach this broader issue in order to prohibit overturning a jury's life determination. Several sources, including the Model Penal Code, endorse a system where the trial judge is the final sentencer (as in Florida), but an

<sup>11</sup> H. Kalven and H. Zeisel, The American Jury 445 (1966), cited in Duncan 391 U.S. at 157 and nn. 24 & 26.

<sup>12</sup> See, e.g., Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968, 969 (1967); Rubin, The Law of Criminal Correction 375 (1973). LaFont, Assessment of Punishment--A Judge or Jury Function, 38 Texas L. Rev. 834, 838 (1960); Report of the Royal Commission on Capital Punishment, 1949-1953, ¶571.

<sup>13</sup> See American Bar Association Project on Standards for Criminal Sentencing, Sentencing Alternatives and Procedures, §1.1, Commentary (Approved Draft 1968) 47-48 (reasons for giving requiring jury consent for death penalty); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force report, The Courts 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

<sup>14</sup> See Liebman and Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor, 66 Geo.L.J. 757, 819 n. 273 (1978) (jury is appropriate, if not constitutionally mandated, capital sentencing forum); Mannheim, The Capital Punishment Cases: A Criticism of Judicial Method, 12 Loy.L. Rev. 85, 107-108, 131 (1978) (suggests requirement of jury consent for death in penalty phase under the Constitution); Gillers, Deciding Who Dies, 129 U. Penn. L. Rev. 1, 39-74 (1980) (jury consent for death constitutionally required).

advisory jury's decision against death is final.<sup>15</sup> One commentator comparing several post-Furman systems generally endorses Florida's statute and case law, but disapproves of the tension created between judge and jury when a jury's decision for life can be overruled.<sup>16</sup>

#### E. Conclusion

This Court should grant certiorari to reconsider whether a state legislature may involve a jury in a capital punishment trial similar to a trial on guilt or innocence and then treat a finding in favor of the accused as merely advisory. Because the capital decision hinges upon retribution, only a jury can decide who dies. For this reason, virtually every State in the Nation makes jury verdicts for life binding. Florida's system of jury override is unconstitutional.

<sup>15</sup> American Law Institute, Model Penal Code 210.6 and Commentary at 133 (Prop. Off. Draft 1962); Togman, supra, 39 N.Y.U.L. Rev. 50, 53; Wollan, The Death Penalty After Furman, 1974 Crim. Justice Systems Rev. 213, 230; Symposium on Capital Punishment, 7 N.Y.L. Forum 249, 312-313 (1961) (opinion of Prof. Louis B. Schwartz); Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33, 52-53 (1972).

<sup>16</sup> Shapiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana, 24 Loy. L. Rev. 709, 736, 743-747 (1978).

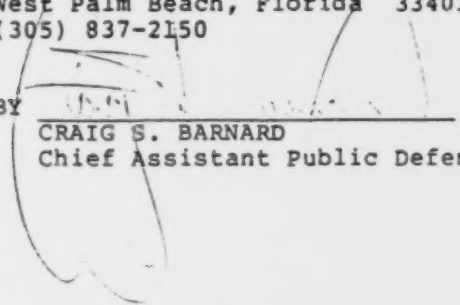
CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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BY

  
CRAIG S. BARNARD  
Chief Assistant Public Defender

APPENDIX A

Joseph Robert SPAZIANO, Appellant,

v.

STATE of Florida, Appellee.

No. 50250.

Supreme Court of Florida.

May 26, 1983.

Rehearing Denied July 13, 1983.

Defendant was convicted of first-degree murder in the Circuit Court, Seminole



County, Robert B. McGregor, J., and the jury recommended life imprisonment. The trial judge overrode the jury verdict to impose the death sentence, and defendant appealed. The Supreme Court, 393 So.2d 1119, affirmed defendant's conviction but remanded for resentencing. The trial court reimposed the death sentence following the resentencing hearing, and defendant appealed. The Supreme Court held that: (1) consideration at resentencing hearing of prior violent felony as aggravating factor did not improperly expand scope of remand or subject defendant to double jeopardy by introduction of new evidence to prove additional aggravating factors; (2) consideration of defendant's previous convictions for felonies involving violence as aggravating factor at resentencing proceeding was proper, though such convictions were not presented to jury for consideration in original sentencing proceeding; (3) trial judge's imposition of death sentence following jury recommendation of life imprisonment did not violate double jeopardy protections of Fifth Amendment; (4) due process did not require that resentencing proceedings be assigned to new judge.

Affirmed.

McDonald, J., dissented and filed opinion.

#### 1. Criminal Law — 163, 1192

Consideration at resentencing hearing of prior violent felony as aggravating factor did not improperly expand scope of remand or subject defendant to double jeopardy by introduction of new evidence to prove additional aggravating factor, where information concerning conviction, which was then on appeal, was contained in original presentence investigation report so that evidence of conviction clearly had been submitted in initial proceeding. U.S.C.A. Const.Amend. 5.

#### 2. Criminal Law — 1192

In resentencing proceeding after remand, trial judge may properly apply the law and is not bound by prior legal error.

#### 3. Criminal Law — 1208(1)

Trial court, in imposing death sentence, did not err in considering defendant's previous convictions for felonies involving violence, though such convictions were not presented to jury for consideration in original sentencing proceeding. West's F.S.A. § 921.141; U.S.C.A. Const.Amend. 8, 14.

#### 4. Homicide — 354

Defendant's torture of victim with knife while she was still living was properly considered by trial judge as aggravating factor in overriding jury recommendation of life sentence, and met clear and convincing test to allow override of jury's recommendation.

#### 5. Criminal Law — 163

Trial judge's imposition of death sentence following jury recommendation of life imprisonment did not violate double jeopardy protection of Fifth Amendment where death penalty procedure was not based on a controlling jury recommendation concerning sentencing, and case was not one in which appellants had been granted a new trial and had been resentenced by new jury. U.S.C.A. Const.Amend. 5.

#### 6. Constitutional Law — 270(1)

Where defendant offered no evidence of bias or prejudice on part of sentencing judge other than fact he was trial judge in case, and evidence showed that sentencing judge properly disregarded improper information in original presentence investigation report in resentencing defendant, defendant was not denied due process because resentencing proceedings were not assigned to new judge. U.S.C.A. Const.Amend. 14.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender and Jerry L. Schwarz, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Tallahassee, Richard W. Prospect and Sean Daly, Asst. Attys. Gen., Daytona Beach, for appellee.

## PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant following a resentencing hearing ordered by this Court in *Spaziano v. State*, 393 So.2d 1119 (Fla.), cert. denied, 454 U.S. 1037, 102 S.Ct. 581, 70 L.Ed.2d 484 (1981). We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. We affirm.

Appellant was convicted in 1976 of the first-degree murder of Laura Harberts. The testimony at appellant's trial revealed that appellant "often bragged about the girls he had mutilated and killed," and that on one occasion he had taken two individuals to a dump site to show them two corpses to substantiate his claim of responsibility for the murders. One of the individuals accompanying appellant to the dump site later directed police officers to the bodies, one of which was identified through the use of dental records as being that of Miss Harberts.

The jury recommended that appellant be sentenced to life imprisonment. The trial judge, at the initial sentencing proceeding, ordered and considered a presentence investigation report. He imposed the death sentence, finding two aggravating circumstances: (1) that the offense was committed in a manner which was heinous, atrocious, and cruel; and (2) that the defendant was previously convicted of felonies involving the use or threat of violence to the person. These felony convictions were listed in the presentence investigation report, and included two convictions discussed in a confidential section of the report which the appellant was not given the opportunity to explain or deny.

On appeal, we affirmed appellant's conviction, but remanded for resentencing to comply with the dictates of *Gardner v. Florida*, 430 U.S. 849, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which was decided after the trial of this case.

Following our remand, the trial judge ordered a new presentence investigation report and conducted a hearing to provide appellant the opportunity to respond to the report. Following this sentencing hearing,

the trial judge reimposed the death sentence, once again finding two aggravating and no mitigating circumstances. Appellant raises five asserted errors in the resentencing proceedings.

Appellant first contends that at the resentencing hearing the trial judge improperly allowed the state to introduce new evidence in support of an aggravating circumstance. In the original sentencing phase, the trial judge rejected the state's proffer of evidence to the jury which established the appellant's conviction of forcible carnal knowledge and aggravated battery because the conviction was then on appeal. This information was also contained in the original presentence investigation report. Upon remand, because this conviction was affirmed on appeal, the trial judge did consider it as an aggravating circumstance in the resentencing proceedings. Appellant contends that the consideration of this conviction improperly expanded the scope of the remand in violation of *Songer v. State*, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), and *Dougan v. State*, 398 So.2d 439 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981), and in effect allowed the state to reopen its case to prove additional aggravating factors in the sentencing phase in violation of the double jeopardy rule set out in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). We reject this contention.

[1, 2] Neither *Songer* nor *Dougan* is applicable here. In each case this Court rejected appellant's attempt to expand the *Gardner* remand proceedings beyond the limited purpose of explaining or denying the contents of the presentence investigation report by either calling character witnesses whose testimony was not relevant to the report or by attempting to create a full-blown sentencing proceeding. The conviction considered by the court in the resentencing proceedings was in fact contained in the original presentence investigation report and the trial judge could have properly considered this conviction during the origi-

nal sentencing phase. In *Peek v. State*, 395 So.2d 492 (Fla.1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), we held that a trial judge could take into account convictions which were on appeal at the time of sentencing. Not only could the trial judge have considered the appellant's conviction in the original proceeding, but the information of the conviction as an aggravating circumstance was previously before the court. This circumstance does not expand the scope of the remand by allowing the state to introduce new evidence. The evidence clearly had been submitted in the initial proceedings. We hold that the trial judge may properly apply the law and is not bound in the remand proceedings by a prior legal error. [We note *Peek* was decided subsequent to the first trial.] There was no *Bullington* double jeopardy violation and appellant was given a full opportunity to explain or deny the conviction in the resentencing process.

[3] Appellant secondly contends that the trial court erred in considering the appellant's previous convictions for felonies involving violence, when such convictions were not presented to the jury for consideration in the original sentencing proceedings. According to the appellant, the trial judge's actions were violative of section 921.141, Florida Statutes (1973), Florida's death penalty provision, and the eighth and fourteenth amendments of the United States Constitution. The appellant's contention is without merit. In *White v. State*, 403 So.2d 331, 339 (Fla.1981), we upheld a sentence of death imposed by the trial judge in the face of the jury's recommendation of life where the trial judge "noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." Because the aggravating circumstances outweighed any possible mitigating circumstances, the trial judge concluded that the death sentence was appropriate and we affirmed. We reach the same conclusion in this case.

[4] Third, appellant contends that the trial court erred in overriding the jury's recommendation of life because the aggravating circumstances considered by the trial judge were improper. We have already discussed and approved the aggravating circumstance of a prior conviction of a violent felony. We also conclude that the other aggravating circumstance, that the murder was heinous, atrocious, and cruel, was properly determined by the trial judge to be applicable to this case. One of the individuals who accompanied the appellant to the dump site to view the two corpses testified that the bodies were covered with "quite a bit" of blood and he could see cuts on the breasts, stomach, and chest. The witness further testified that appellant told him of how he tortured the victim with his knife while she was still living. This testimony of appellant's treatment of his victim clearly places his acts within the category of "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" so as to set this "crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 296 (1974). We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, including the prior conviction of a violent felony which the jury did not have an opportunity to consider, meets the clear and convincing test to allow override of the jury's recommendation in accordance with previous decisions of this Court. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

[5] Fourth, the appellant contends that the imposition of the death sentence following a jury recommendation of life imprisonment violates the double jeopardy protections of the fifth amendment of the United States Constitution and conflicts with *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). *Bullington* is not applicable to this case. The Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing, as was the Missouri procedure in *Bullington*. More important, however, this is not a case in which the appellant has been granted a new trial and has

been resentenced by a new jury. This Court has already decided the double jeopardy issue raised by appellant. In *Douglas v. State*, 373 So.2d 895 (Fla.1979), it was argued that "a jury's life recommendation is tantamount to a judgment of acquittal of a crime for which a death sentence is appropriate, because it reflects either an absence of proven aggravating circumstances or an absence of proof that the aggravating circumstances outweigh any mitigating circumstances." *Id.* at 896. We rejected this argument in *Douglas* for two reasons. First, the jury's function under the Florida death penalty statute is advisory only. See *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Second, allowing the jury's recommendation to be binding would violate *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[6] Fifth, the appellant contends that he was denied due process because the resentencing proceedings were not assigned to a new judge. The trial judge denied appellant's motion for substitution of judge in the resentencing proceedings. Appellant contends that a sentencing judge who has heard and relied upon improper evidence in imposing a death sentence cannot without difficulty consider proper factors on resentencing without also considering the improper evidence. To adopt this assertion would mean that whenever a defendant must be resentenced in any proceeding, a new judge must be assigned. We note that appellant offers no evidence of bias or prejudice on the part of the sentencing judge other than the fact that he was the trial judge in this case. In *Douglas v. Wainwright*, 521 F.Supp. 790 (M.D.Fla.1981), the court rejected a similar argument, finding that the sentencing judge's statements showed that improper convictions were not used against the defendant in sentencing. The court in *Douglas* followed *United States v. Gaither*, 503 F.2d 452 (5th Cir. 1974), cert. denied, 420 U.S. 961, 95 S.Ct. 1349, 43 L.Ed.2d 437 (1975), which held that it is not inherently impossible for a court to disclaim consideration of an improper conviction in sentencing while still having knowledge of the conviction. We conclude

that the evidence in the instant case clearly indicates that the sentencing judge properly disregarded the information in the original presentence investigation report in resentencing appellant.

For the reasons expressed, we affirm the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., dissents with an opinion.

McDONALD, Judge, dissenting.

I dissent on the sentence of death primarily because the jury recommended life. I see no compelling reason to override that recommendation. The jury viewed this defendant and listened to the details of this homicide. They could conclude that a life sentence is appropriate. After all, Spaziano was known as "Crazy Joe." When he was 20 years old he was involved in a serious accident. Ever since then he has not been "normal." The jury could well find that he was entitled to the statutory mental mitigating factors. The bizarre and gross nature of this homicide is supportive of that finding. Certainly on factual disputes the trial judge, and we on review, should yield any contrary beliefs to that of the jury. I would remand with instructions to impose a life sentence without eligibility for parole for twenty-five years.



APPENDIX B



JOSEPH ROBERT SPAZIANO,

\*\*

Appellant,

\*\*

CASE NO. 50,250

vs.

\*\*

Circuit Court Case No. 75-430-CFA  
(Seminole)

STATE OF FLORIDA,

\*\*

Appellee.

\*\*

On consideration of the motion for rehearing filed by  
attorney for appellant,

IT IS ORDERED by the Court that said motion be and the  
same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., Concur  
McDONALD, J., Dissents

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TEST:

cc: Hon. Arthur H. Beckwith, Jr., Clerk  
Hon. Robert B. McGregor, Judge

Craig S. Barnard, Esquire  
Richard W. Prospect, Esquire

Sid J. White  
Clerk Supreme Court

By:

Deputy Clerk

*Dulhi Causseay*

APPENDIX C

## CHAPTER 921

## SENTENCE

tenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sen-

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

Note.—Former s. 919.23

(4) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) **AGGRAVATING CIRCUMSTANCES.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237, ch. 14534, 1939; CGL 1940 Supp. #663-246; s. 119, ch. 70, § 19, s. 1, ch. 72, § 2, s. 9, ch. 72, § 2, s. 1, ch. 74, § 37, s. 248, ch. 77, § 104, s. 1, ch. 77, § 174.

APPENDIX D



JUDGE/JURY ROLES IN CAPITAL PENALTY  
DETERMINATION

A Survey of National Legislative Practice  
1972-1981

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum.Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, §27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1978 Cum.Supp.) §532.025 #	" (?)
LOUISIANA	Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, §55	L
MISSISSIPPI	Code (1978 Cum. Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec. Pamph.)	L

MISSOURI (con't)	§565.006	
NEVADA	Rev. Stats. (1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024 (D) (2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck.Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: S23A-27A-4	L (?)
TENNESSEE	Code Ann. (1978 Cum.Supp.) §39-2404	L
TEXAS	Code Crim.Proc.Art. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Supp.) §19.2-264.4	L

WASHINGTON	Rev. Code Ann. (1978 Pck.Pt) §10.94.020	U (?)
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

## 2. Jury Life Verdict Not Binding

ALABAMA	Senate Bill 241, §§8-9 (1981)	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1979) §35-50-2-9	U

## 3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp. Pamph) §13-454
IDAHO	Code (1978 Cum. Pck.Supp.) §19-2515
MONTANA	Rev. Codes (1977 Unterim Supp.) §95-2206.6
NEBRASKA	Rev. Stats. (1975) §29-2520
OREGON	Rev. Stats. (1979) §163.116 *

## LEGENDS AND NOTATIONS

L---Life sentence unless jury  
unanimously agrees on death  
U---Unanimous verdict required for

either life or death

M---Simple majority suffices for verdict of either life or death

A---Alabama system: 10 jurors required for death, 7 jurors required for life

T---Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

\* The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) §532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

\* Oregon death penalty statute declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (or. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

\*\*\*\*\*

#### OVERALL CATEGORIES

JURY LIFE VERDICT BINDING-----	29
JURY LIFE VERDICT NOT BINDING-----	3
PENALTY DETERMINED BY JUDGE(S) ALONE--	<u>5</u>
TOTAL JURISDICTIONS	37

#### PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING -----	29
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING -----	<u>3</u>
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

\*\*\*\*\*



RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY	
UNANIMOUS FOR DEATH (L)-----	22
UNANIMITY REQUIRED FOR EITHER	
LIFE OR DEATH (U)-----	7*
10 JURORS REQUIRED FOR DEATH,	
7 FOR LIFE (A)-----	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR	
DEATH (M)-----	1*
TEXAS PROCEDURE--SPECIAL PENALTY	
QUESTIONS (T)-----	1
 SUBTOTAL OF JURISDICTIONS WITH	
JURY PARTICIPATION	32

\*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

\*\*\*\*\*

METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON LEGISLATIVE INFORMATION AVAILABLE TO DECEMBER 22, 1981

APPENDIX E

UTAH EXECUTIONS AND DEATH SENTENCES  
JURY RECOMMENDATIONS

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years

while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH  
1948-1967

<u>Name - Date of</u> <u>Verdict</u>	<u>Dist.Ct.# and</u> <u>Appellate Report</u>
1. Mares, Elisio J. Executed - 9/10/51 Verdict - March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 <u>State v. Mares,</u> <u>192 P.2d 861</u> (Ut. 1948)

<u>Name - Date of Verdict</u>	<u>Dist.Ct.# and Appellate Report</u>
2. Gardner, Ray Dempsey - Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist.Ct. #4803 <u>State v. Gardner,</u> 230 P.2d 559 (Ut. 1951)
3. Neal, Don Jesse Executed - 7/1/55 Verdict - (see note)----	(see note)----- <u>State v. Neal,</u> 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted <u>lack of jury mercy</u> <u>recommendation id.</u> at 759.
4. Braasch, Vern A. Executed - 5/11/56 Verdict - Dec. 9, 1949	Iron Cnty. 5th Dist.Ct. #171 <u>State v. Braasch,</u> 229 P.2d 289 (Ut. 1951)
5. Sullivan, Melvin L. Executed - 5/11/56 Verdict - Dec. 9, 1949	Same as Braasch (co-defendant) <u>Sub nomine</u> <u>Braasch</u>
6. Kirkham, Barton K. Executed - 6/7/58 Verdict - (see note)-----	(see note)----- <u>State v. Kirkham,</u> 319 P.2d 859, 862 (Ut. 1958). <u>Absence of jury</u> <u>mercy recommendation</u>

6. Kirkham (con't) noted in opinion, id.  
at 862.

7. Rodgers, James San Juan Cnty. 7th  
W. Dist. Ct. Crim.  
Executed - #243  
3/30/60 State v. Rodgers,  
Verdict - 329 P.2d 1075  
Dec. 14, 1957 (Ut. 1958)

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.



DEFENDANTS WITH DEATH SENTENCES AFFIRMED  
IN UTAH AFTER LIFE RECOMMENDATIONS WHO  
WERE NEVERTHELESS NOT EXECUTED (THIS  
LIST IS NOT NECESSARILY EXHAUSTIVE,  
ALTHOUGH THERE IS NO SPECIFIC INDICATION  
THAT OTHER CASES EXIST).

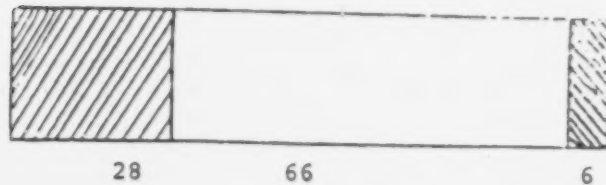
<u>Name</u>	<u>Appellate Opinion Aff'g Sentence &amp; Date Commuted</u>
1. Markham, John	<u>State v. Markham</u> , 112 P.2d 496, see 496-497 (Ut. 1941). June, 1941
2. Matteri, Fred	<u>State v. Matteri</u> , 225 P.2d 325, see 329-330 (Ut. 1950). June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching for the existence of any public clemency documents in these cases.

APPENDIX F

JUDGE/JURY CAPITAL PENALTY DISAGREEMENT  
IN 21 FLORIDA COUNTIES  
1972-1978

When Judge and/or Jury Find(s) For Death  
Penalty in percentages



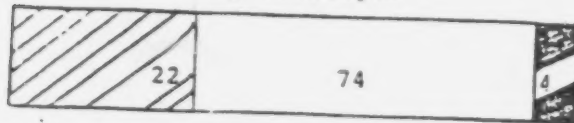
Jury: life	death	death
Judge: death	death	life

NOTE: This chart is based on a survey of all 79 cases in 21 of the 67 Florida counties during the period 1972-1978 where the penalty jury and/or the trial judge reached a verdict or sentence of death. The data is reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished paper at the University of North Florida), and is summarized in S. Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68 n. 318 (1980).

This data does not include cases where the accused waived a penalty jury.

Table 10

Judge-Jury Disagreement on Issue of Guilt  
When either or both convict  
in percentages



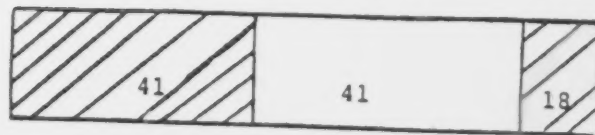
Jury: not guilty    guilty    guilty  
Judge: guilty        guilty    not guilty

Judge and Jury Disagree

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 36 (1968). Table based on survey of trial judge's hypothetical verdict if (s)he had tried case alone (where jury was actual trier of guilt or innocence). Data based on both capital and noncapital cases studied in H. Kalven, Jr. and H. Zeisel, The American Jury (1966).

Table 11

Judge-Jury Disagreement on the Death  
Penalty  
When either or both impose it  
in percentages



Jury: prison . death death  
Judge: death death prison

Judge and Jury Disagree

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37 (1968). Table based on survey of trial judge's hypothetical verdict on penalty if (s)he had tried case alone, in capital cases where jury was trier of fact and had discretion to choose between death and imprisonment.

82-3276

No. \_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1983

RECEIVED  
OCT 17 1983  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JOSEPH ROBERT SPAZIANO  
Petitioner,  
vs.

STATE OF FLORIDA,  
Respondent.

Supreme Court, U.S.  
FILED  
OCT 17 1983  
Alexander L. Stevas, Clerk

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JOSEPH ROBERT SPAZIANO, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantialy the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
224 Datura Street/13th Floor  
West Palm Beach, Florida 33401  
(305) 837-2150

BY Craig S. Barnard  
CRAIG S. BARNARD  
Chief Assistant Public Defender



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1983

=====

JOSEPH ROBERT SPAZIANO,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

=====

AFFIDAVIT

I, JOSEPH ROBERT SPAZIANO, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees;

1. I am the petitioner in the above-entitled case.
2. Because of my poverty I am unable to pay the costs of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted and sentenced to death by the Circuit Court of Seminole County, Florida. The Supreme Court of Florida upheld the conviction and death sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

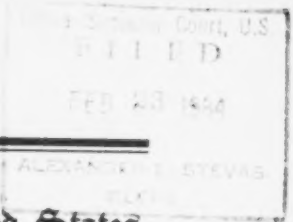
*Joseph Robert Spaziano*  
JOSEPH ROBERT SPAZIANO

Duly witnessed and sworn to before me  
this 4 day of October, 1983.

*Victory L. Mays*  
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES SEPTEMBER 15, 1984

No. 83-5596



---

**In the Supreme Court of the United States**

OCTOBER TERM, 1983

---

JOSEPH ROBERT SPAZIANO, PETITIONER

VS.

STATE OF FLORIDA, RESPONDENT

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

---

**JOINT APPENDIX**

---

JIM SMITH  
*Attorney General*

MARK C. MENSER  
*Assistant Attorney  
General*  
125 North Ridgewood  
Avenue  
4th Floor

DAYTONA BEACH,  
FLORIDA 32014

*Counsel for  
Respondent*

RICHARD L. JORANDBY  
*Public Defender*  
224 Datura Street/  
13th Floor  
West Palm Beach,  
Florida 33401

CRAIG S. BARNARD  
*Chief Assistant Public  
Defender*

*Counsel for Petitioner*

---

**Petition For Certiorari Filed October 11, 1983.  
Certiorari Granted January 9, 1984.**

## INDEX TO JOINT APPENDIX

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# CHRONOLOGICAL LIST OF IMPORTANT DATES

Document/Activity	Date
Offense, alleged date	Between August 4, and August 22, 1973
Indictment, first degree murder	September 12, 1975
Capias for Arrest	September 12, 1975
Jury trial commences	January 20, 1976
Verdict, guilty as charged	January 23, 1976
Capital penalty trial	January 26, 1976
Advisory jury verdict of life	January 26, 1976
Judgment of conviction	July 16, 1976
Sentence of Death	
Opinion of the Supreme Court of Florida, affirming conviction and remanding sentence for violation of <i>Gardner v. Florida</i>	January 8, 1981
Denial of rehearing	March 6, 1981
Sentencing hearing in the trial court	May 28, 1981
Petition for a writ of certiorari docketed in this Court (No. 80-6785)	June 2, 1981
Sentence of death reimposed	June 4, 1981
Order of this Court, denying peti- tion for a writ of certiorari	November 9, 1981
Order of this Court, denying peti- tion for rehearing	January 11, 1981
Opinion of the Supreme Court of Florida affirming the sentence of death	May 26, 1983
Order denying rehearing	July 13, 1983
Order granting the petition for a writ of certiorari	January 9, 1984

---

No. K-75-430-CFA  
IN CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA  
SEMINOLE COUNTY

---

THE STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO  
A/K/A  
CRAZY JOE

---

**INDICTMENT FOR  
FIRST DEGREE MURDER**

Found Spring Term A.D. 1975.

/s/ RUTH DENTON

*Foreman of the Grand Jury*

Presented in Open Court and Filed this 12th day of  
September, 1975

/s/

ARTHUR H. BECKWITH, JR.  
*Clerk*

BY:/s/

CLAUDIA HUGHEY

**STATE WITNESSES**

George Abbg  
Ralph DiLisio  
Anthony DiLisio  
Henrietta Young

---

[INDICTMENT; FILED SEPTEMBER 12, 1975]  
IN THE NAME AND BY AUTHORITY OF  
THE STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE Eighteenth Judicial Circuit of the State of Florida for Seminole County, at the Spring Term thereof, in the year of our Lord One Thousand Nine Hundred and Seventy-Five, Seminole County, to-wit: The Grand Jurors of the State of Florida; inquiring in and for the body of the County of Seminole, upon their oaths do charge that in Seminole County, Florida, on or about August 6th, 1973, JOSEPH ROBERT SPAZIANO a/k/a CRAZY JOE, did unlawfully kill a human being, LAURA LYNN HARBERTS, and said killing was perpetrated by said JOSEPH ROBERT SPAZIANO a/k/a CRAZY JOE, from a premeditated design or intent to effect the death of said LAURA LYNN HARBERTS, contrary to Section 782.04(1)(a), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/

\_\_\_\_\_  
*Foreman of the Grand Jury*

A TRUE BILL

I hereby certify that I have, as authorized and required by law, advised the Grand Jury returning the foregoing indictment.

/s/

\_\_\_\_\_  
*State Attorney*



IN THE CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT OF  
STATE OF FLORIDA IN AND  
FOR SEMINOLE COUNTY

CASE No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

---

**VERDICT OF THE JURY**

[Filed January 26, 1976]

We, The Jury, find the Defendant Joseph Robert Spaziano Guilty of Murder In The First Degree, Section 782.04(1)(a), Florida Statutes

So say we all.

/s/

\_\_\_\_\_  
*Foreman*

Date: January 23, 1976

Filed in Open Court this 23rd day of January, 1976, by  
Mona Lee, *Trial Clerk*

IN THE CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT OF  
STATE OF FLORIDA IN AND  
FOR SEMINOLE COUNTY

CASE No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

---

**VERDICT OF THE JURY**

[Unused; Filed January 26, 1976]

We, The Jury, find the Defendant Joseph Robert  
Spaziano Not Guilty.

So say we all.

/s/ \_\_\_\_\_

*Foreman*

Date: \_\_\_\_\_

Filed in Open Court this \_\_\_\_ day of \_\_\_\_\_,

By \_\_\_\_\_

*Trial Clerk*

IN THE CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT OF  
STATE OF FLORIDA IN AND  
FOR SEMINOLE COUNTY

---

INDICTMENT No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

---

ADVISORY SENTENCE OF THE JURY

[Filed January 27, 1976]

A majority of the jury advise and recommend to the court that it impose a sentence of life imprisonment upon the defendant, Joseph Robert Spaziano.

/s/ \_\_\_\_\_  
*Foreman*

Date: January 26, 1976

Filed in Open Court this 26th day of January, 1976, by Mona Lee, *Trial Clerk*

IN THE CIRCUIT COURT  
EIGHTEEN JUDICIAL CIRCUIT OF  
STATE OF FLORIDA IN AND  
FOR SEMINOLE COUNTY

---

INDICTMENT No. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO

---

ADVISORY SENTENCE OF THE JURY

[Unused, January 27, 1976]

A majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, *Joseph Robert Spaziano*.

/s/ \_\_\_\_\_  
Foreman

Date: \_\_\_\_\_

Filed in Open Court this \_\_\_\_ day of \_\_\_\_\_, 1976,

by \_\_\_\_\_  
Trial Clerk

IN THE CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT, OF FLORIDA

---

CRIMINAL DIVISION  
CASE No. 75-430-CFA

STATE OF FLORIDA,

v.

JOSEPH ROBERT SPAZIANO A-K-A CRAZY JOE,  
DEFENDANT

---

JUDGMENT OF CONVICTION  
and  
IMPOSITION OF SENTENCE  
(Rule 3.670, 3.700—Sec. 921.141, F.S.  
cap. fel.-verdict-PSI-death)  
[Filed July 19, 1976]

---

The above-named defendant appeared with his counsel to stand trial on the charges in the indictment herein, and a jury of twelve good, lawful and qualified electors of this county were duly selected, empanelled and sworn to well and truly try the issues and render a true verdict according to the law and evidence, the taking of testimony was commenced and concluded and after hearing argument of counsel and instructions as to the law, the jury retired, deliberated, returned and rendered a unanimous verdict finding the defendant guilty and the court conducted, as provided in Section 921.141(1), F.S., a separate sentencing proceeding before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment wherein evidence was presented to matters relevant to sentence including matters relating to the aggravating and mitigating circumstances as specified in Section 921.141(5) and (6), F.S. and the State and the defendant and his counsel were permitted to present argument for and against the

sentence of death and, thereupon, the jury again deliberated and rendered an advisory sentence to the court wherein a majority of the jury recommended that the defendant should be sentenced to life imprisonment; thereafter the court ordered a Presentence Investigation and considered it as well as the facts heard during the trial and during the separate sentencing proceeding and itself weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of the jury, found that sufficient aggravating circumstances existed to justify and authorize a death sentence and that the mitigating circumstances were insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. The court makes the following findings of fact upon which the sentence of death is based:

1. The homicide committed by the defendant was especially heinous and atrocious. The victim was not only murdered; she was also mutilated in a very gross manner. Her breasts were cut off and her vagina was cut out. The defendant when asked by a friend as to why he did it that way, stated "Man, that's my style." This crime appears to this court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." See *Dixon v. State*, 283 So. 2d 1, 9.

2. The defendant was previously convicted of felonies involving the use or threat of violence to the person. Prior to this trial, viz, on August 13, 1975, the defendant was sentenced to life imprisonment for a violent sex crime that occurred on February 9, 1974. He was also sentenced to a consecutive five years for aggravated battery arising out of the same incident. The details of this incident are referred to some detail at page 1A of the Confidential Evaluation section of the Presentence Investigation Report which, because of its confidential nature, is sealed and attached only to the original and first certified copy (Governor's copy) hereof as Exhibit A. In addition, the defendant's prior conviction record as set out on pages two and three of the Presentence Investigation Report shows a conviction in New York State for 3rd Degree Assault, on August 9, 1963, and a forfeited bail on another such charge on Octo-



ber 20, 1963. Incidentally this same record shows that the defendant was twice placed on probation and in each case the probation was subsequently revoked.

3. This court has considered the other statutory categories of aggravating circumstances and finds them inapplicable because either there is no evidence to bring them into focus or the evidence so circumstantial that it does support a conclusive inference; for example, it *might* be inferred from a totality of circumstances that the defendant was engaged in the commission of, or an attempt to commit rape and/or kidnaping and that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

4. This court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation to give rise to any such mitigating circumstances except, perhaps, the age of the defendant. The defendant was born September 12, 1945. On the date of victim's death, August 6, 1973, he would have been nearly twenty-eight years of age. (The victim was eighteen years of age). This is not such youthfulness as would outweigh the aggravating circumstances found to exist particularly when viewed in the light of a criminal history beginning when the defendant was eighteen years of age.

and thereafter,

JUDGMENT was rendered in open court and entered on the minutes of the court that said defendant was adjudged guilty and convicted of Murder In The First Degree, (Section 782.04(1)(a), F.S.); and the court informed the defendant of the accusation against him and of the judgment and of his right of allocution and he showed no cause authorized by law why sentence should not be pronounced and imposed upon him, he was

SENTENCED to be put to death in the manner and means provided by law (Section 922.10, F.S.). The court informed the defendant of his right to appeal from this judgment and sentence.

# **DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:**

The clerk of this court shall file and record this judgment and sentence and seal its attachment and shall prepare four certified copies of this record of conviction and sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Offender Rehabilitations to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings and instructions of the court both in the original trial, and the separate sentencing proceedings and at the time of adjudication and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4), F.S.), the Clerk of this court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S. and F.A.R. Rule 6.9 e.) and two copies thereof and, after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon the Attorney General of the State of Florida and one copy thereof upon counsel for the defendant on appeal. After the Clerk has filed a transcript of record on appeal with the Appellate

Court, counsel for the defendant on appeal shall file his brief within the time provided in F.A.R. Rule 6.11 b. The Clerk of this court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 16th day of July, 1976.

/s/

\_\_\_\_\_  
ROBERT B. MCGREGOR  
*Circuit Judge*

IN THE CIRCUIT COURT  
EIGHTEENTH JUDICIAL CIRCUIT, OF FLORIDA

---

CRIMINAL DIVISION  
CASE NO. 75-430-CFA

STATE OF FLORIDA

v.

JOSEPH ROBERT SPAZIANO  
A-K-A CRAZY JOE, DEFENDANT

---

AMENDED JUDGMENT of  
conviction and imposition of SENTENCE  
(Rule 3.670, 3.700—Sec. 921.141, F.S.  
cap. fel.—verdict—PSI—death)  
[Filed July 29, 1976]

---

The above-named defendant appeared with his counsel to stand trial on the charges in the indictment herein, and a jury of twelve good, lawful and qualified electors of this county were duly selected, empanelled and sworn to well and truly try the issues and render a true verdict according to the law and evidence, the taking of testimony was commenced and concluded and after hearing argument of counsel and instructions as to the law, the jury retired, deliberated, returned and rendered a unanimous verdict finding the defendant guilty and the court conducted, as provided in Section 921.141(1), F.S., a separate sentencing proceeding before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment wherein evidence was presented to matters relevant to sentence including matters relating to the aggravating and mitigating circumstances as specified in Section 921.141(5) and (6), F.S. and the State and the defendant and his counsel were permitted to present argument for and against the sentence of death and, thereupon, the jury again deliberated and rendered an advisory sentence to the court where-

in a majority of the jury recommended that the defendant should be sentenced to life imprisonment; thereafter the court ordered a Presentence Investigation and considered it as well as the facts heard during the trial and during the separate sentencing proceeding and itself weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of the jury, found that sufficient aggravating circumstances existed to justify and authorize a death sentence and that the mitigating circumstances were insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. The court makes the following findings of fact upon which the sentence of death is based:

1. The homicide committed by the defendant was especially heinous and atrocious. The victim was not only murdered; she was also mutilated in a very gross manner. Her breasts were cut off and her vagina was cut out. The defendant when asked by a friend as to why he did it that way, stated "Man, that's my style." This crime appears to this court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." See *Dixon v. State*, 283 So. 2d 1, 9.

2. The defendant was previously convicted of felonies involving the use or threat of violence to the person. Prior to this trial, viz, on August 13, 1975, the defendant was sentenced to life imprisonment for a violent sex crime that occurred on February 9, 1974. He was also sentenced to a consecutive five years for aggravated battery arising out of the same incident. The details of this incident are referred to some detail at page 1A of the Confidential Evaluation section of the Presentence Investigation Report which, because of its confidential nature, is sealed and attached only to the original and first certified copy (Governor's copy) hereof as Exhibit A. In addition, the defendant's prior conviction record as set out on pages two and three of the Presentence Investigation Report shows a conviction in New York State for 3rd Degree Assault, on August 9, 1963, and a forfeited bail on another such charge on October 20, 1963. Incidentally this same record shows that the

defendant was twice placed on probation and in each case the probation was subsequently revoked.

3. This court has considered the other statutory categories of aggravating circumstances and finds them inapplicable because either there is no evidence to bring them into focus or the evidence so circumstantial that it does not support a conclusive inference; for example, it *might* be inferred from a totality of circumstances that the defendant was engaged in the commission of, or an attempt to commit, rape and/or kidnapping and that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

4. This court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation to give rise to any such mitigating circumstances except, perhaps, the age of the defendant. The defendant was born September 12, 1945. On the date of victim's death, August 6, 1973, he would have been nearly twenty-eight years of age. (The victim was eighteen). This is not such youthfulness as would outweigh the aggravating circumstances found to exist particularly when viewed in the light of a criminal history beginning when the defendant was eighteen years of age. and thereafter.

JUDGMENT was rendered in open court and entered on the minutes of the court that said defendant was adjudged guilty and convicted of Murder In The First Degree, (Section 782.04(1)(a), F.S.); and the court informed the defendant of the accusation against him and of the judgment and of his right of allocution and he showed no cause authorized by law why sentence should not be pronounced and imposed upon him, he was

SENTENCED to be put to death in the manner and means provided by law (Section 922.10, F.S.). The court informed the defendant of his right to appeal from this judgment and sentence.



## DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:

The Clerk of this court shall file and record this judgment and sentence and seal its attachment and shall prepare four certified copies of this record of conviction and sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the defendant and the second certified copy of this conviction and sentence to the custody of the Department of Offender Rehabilitations to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings and instructions of the court both in the original trial, and the separate sentencing proceedings and at the time of adjudication and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4)/F.S.) the Clerk of this court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S. and F.A.R. Rule 6.9 e.) and two copies thereof and, after certification by the sentencing court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon counsel for the defendant on appeal. After the Clerk has filed a transcript of record on appeal with the Appellate Court, counsel for the defendant on appeal shall file his brief within the



time provided in F.A.R. Rule 6.11 b. The Clerk of this court shall forthwith furnish the fourth copy of this judgment to the defendant's counsel on appeal.

The defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 29th day of July, 1976, NUNC PRO TUNC the 16th day of July, 1976.

/s/

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ROBERT B. MCGREGOR,  
*Circuit Judge*

SUPREME COURT OF FLORIDA

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No. 50250

JOSEPH ROBERT SPAZIANO A/K/A  
CRAZY JOE, APPELLANT,

v.

STATE OF FLORIDA, APPELLEE

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Jan. 8, 1981

## PER CURIAM.

This is a direct appeal from the imposition of a death sentence after the appellant had been convicted of first-degree murder. After receiving a jury recommendation of a life sentence for the murder conviction, the trial judge imposed the sentence of death. For the reasons expressed, we affirm the conviction but find we must remand for resentencing because the trial judge relied in part on information not available to the jury or the defendant in imposing the death sentence, contrary to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and also relied upon nonstatutory aggravating factors, in violation of section 921.141, Florida Statutes.

The material facts reflect that the skeletal remains of two bodies were discovered at the Altamonte city dump. One body was positively identified through the use of dental records as that of Laura Harberts. The appellant, Robert Spaziano, was charged with the murder of Harberts, and the principal witness for the state was Ralph Dilisio, a sixteen-year-old acquaintance of the appellant. Dilisio testified that Spaziano often bragged about the girls he had mutilated and killed, and on the occasion Dilisio and another individual accompanied the appellant to the Altamonte dump site where Dilisio saw two corpses, both covered with blood. Dilisio stated that Spaziano claimed responsibility

for these killings; one of the corpses was determined at trial to have been Laura Harberts.

The appellant attacked Dilisio's testimony as being unreliable because at the time he viewed the corpses, Dilisio had been taking numerous types of drugs on a regular basis for at least a year. Defense counsel challenged the sufficiency of Dilisio's recall and perception abilities because of the drug habit, although Dilisio testified that on the particular day of the sighting he had not taken any drugs. Dilisio was able to successfully direct the police to the site where the corpse of Laura Harberts was found.

After receiving its instructions, the jury began its deliberations at 4:39 p.m. and at approximately 8:30 p.m. the court sent the jury to dinner. Upon its return, the following colloquy took place between the trial judge and the jury foreman:

THE COURT: Mr. Pascual, as foreman, the Court would inquire of you if you think that if given more time, there is a reasonable probability that the jury could agree upon a verdict, it being the jury's function to do so?

MR. PASCUAL: Your Honor, I don't know if I can say that there will be reasonable probability, but I think I can speak for the entire jury that I believe we would like to spend some more time. We don't feel, I don't believe, that we're at the point where we are at an impasse that cannot be overcome.

The jury then continued to deliberate until 10:26 p.m., at which time the jury was brought back and, in response to an inquiry from the judge as to whether or not they would be able to reach a verdict, the foreman replied: "At this point, Your Honor, I don't believe so." The trial court then proceeded to instruct the jury by using standard jury instruction 2.19 in effect at the time of the trial, which read as follows:

Ladies and gentlemen, it is your duty to agree upon a verdict if you can do so without violating conscientiously held convictions that are based on the evidence or lack of evidence. No juror, from mere pride or opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of termi-

nating a case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and that this case may be disposed of. [Now renumbered as 2.21.]

The jury resumed their deliberations and approximately thirty minutes later, shortly after 11:00 p.m., they returned a verdict of guilty.

At the conclusion of the sentencing phase of the trial, the jury recommended that the defendant receive a sentence of life imprisonment. The trial court ordered a presentence investigation. In his sentencing order, the judge stated that he considered the presentence investigation report as well as the facts heard during the trial, and found that sufficient aggravating circumstances existed to justify the death sentence. The trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and, secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person. The trial judge based the second finding upon convictions listed in the presentence investigation report, including two convictions discussed in a confidential section of the report. Finally, the trial court found that the other statutory categories of aggravating circumstances were inapplicable, and that there were no mitigating circumstances.

Pursuant to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), after notice of appeal was filed we directed the trial judge to disclose any information he may have used in sentencing that was not disclosed to the defendant. In his response, the trial judge advised this Court that neither party received copies of the confidential portion of the presentence investigation report, nor did they receive the personality inventory report that was attached to it. The trial judge did, in fact, use this information in imposing this death sentence.

### *Trial Phase*

The appellant asserts as grounds for error in the trial phase that: (a) the evidence was insufficient to support the jury's verdict; (b) the trial court erred in its instructions to the jury concerning their responsibilities, and in giving the approved standard jury instruction after an apparent deadlock; (c) the prosecutor's summation was inflammatory and prejudicial; (d) the trial court improperly limited cross-examination of a prosecution witness; and (e) the trial court improperly denied appellant's request for a jury view of the scene.

With reference to the contention that the evidence is insufficient, the appellant asks us to reject in totality the testimony of Dilisio. Dilisio led the authorities to the dump where the bodies were found two years after he observed them with the appellant. Both the jury and the trial judge had a superior vantage point to weigh the credibility of Dilisio's testimony. We find the evidence in this record was sufficient to sustain this jury's verdict.

The contention that the trial judge made improper comments during a colloquy with the jury foreman concerning the status of jury deliberations, and the assertion by the appellant that our standard jury instruction for a deadlocked jury is improper, are both without merit. The colloquy was clearly reasonable and proper, and we find that our standard jury instruction, presently standard 2.21, is fair, unbiased and has been specifically approved by this Court in *State v. Bryan*, 290 So.2d 482 (Fla. 1974). In addition, such a charge has also been approved by the Fifth Circuit Court of Appeals. *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978); *United States v. Solomon*, 565 F.2d 364 (5th Cir. 1978); *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973).

The contention that the prosecutor's comments were inflammatory and prejudicial, that the trial court improperly limited cross-examination, and that the trial court improperly denied a jury view, are clearly without merit and do not warrant discussion.

By Notice of Supplemental Authority, Spaziano raises the argument that the state may not under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), force him to choose between waiving the statute of limitations which had run as to all lesser included non-capital offenses and having the jury instructed only as to first-degree murder. The *Beck v. Alabama* decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of *Beck v. Alabama* may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

#### *Sentencing Phase*

The trial judge considered a confidential portion of the presentence investigation report which contained information that the appellant had been a suspect in four homicides and three bombings, was a member of the "Outlaws" gang, had been convicted of rape and sentenced to the state prison, had been charged with forcible carnal knowledge, rape, and false imprisonment for another incident, but allegedly escaped prosecution because of harassment and threats towards the victim by gang members, and had been convicted of other nonviolent felony and misdemeanor offenses.

In *Gardner v. Florida*, decided after the trial and sentence in this cause, the United States Supreme Court held that a defendant in a death case is denied due process of law when the death sentence is imposed, even in part, on the basis of information that he had no opportunity to deny or explain. The *Gardner* decision prohibits the judge's use of this confidential information in the presentence investigation report without first disclosing that information to Spaziano and providing an opportunity to present evidence in response. Under the standards set down in *Gardner*, we must find clear error in the use of the confidential portion of the presentence investigative report.



Section 921.141(5), Florida Statutes, limits the factors in aggravation which may be considered by the trial judge in imposing the death sentence. In considering a defendant's prior criminal record, the trial judge is limited to only those offenses for which "the defendant was previously convicted." *Provence v. State*, 337 So.2d 783 (Fla.1976). Further, these underlying convictions are also limited to "another capital felony or . . . felony involving the use or threat of violence to the person." § 921.141(5)(b), Fla.Stat. The prior felony offenses involving violence for which the appellant in this case was convicted are proper factors to be considered in aggravation. However, the convictions for non-violent offenses and misdemeanors and charges for which there was no conviction must be excluded as aggravating factors.

In conclusion, we find the *Gardner* violation and the statutory limiting factors in aggravation require this cause to be remanded to the trial judge for resentencing.

We affirm the conviction and remand for resentencing by the trial judge in accordance with the views expressed in this opinion.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.



SUPREME COURT OF FLORIDA

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CASE No. 50,250  
Circuit Court No. 75-430-CFA  
(Seminole)

JOSEPH ROBERT SPAZIANO,  
APPELLANT

v.

STATE OF FLORIDA,  
APPELLEE

---

Upon consideration of the Motion for Rehearing filed in the above cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur.

SUNDBERG, C.J. and ENGLAND, J., would grant Motion for Rehearing for purposes of receiving briefs and argument on the *Beck* issue

JURAT OMITTED IN PRINTING

IN THE CIRCUIT COURT OF THE  
EIGHTEENTH JUDICIAL CIRCUIT,  
IN AND FOR SEMINOLE COUNTY, FLORIDA

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CRIMINAL DIVISION  
CASE NO. 75-430-CFA

STATE OF FLORIDA,  
PLAINTIFF

v.

JOSEPH ROBERT SPAZIANO A/K/A  
"CRAZY JOE", DEFENDANT

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**IMPOSITION OF SENTENCE AFTER REMAND**

[Filed June 16, 1981]

This cause has been remanded to this Trial Court for resentencing by opinion and mandate of the Supreme Court of Florida, (see *Spaziano v. State*, 393 So2d 1119) which remand was for the purpose of conducting a sentencing proceeding in light of the principles enunciated in *Gardner v. Florida*, 430 U.S. 349. Upon receipt of the mandate, this court vacated the sentence earlier imposed, ordered a new Presentence Investigation Report, and scheduled a hearing for the purpose of affording the Defendant an opportunity to present evidence in response to such Presentence Investigation Report. Prior to the hearing both the Defendant and State filed certain motions which were duly ruled upon as the record will reflect. The Defendant upon this Court's order had been returned to the Seminole County Jail from the Department of Corrections and was present before the Court with counsel for the hearing on the motions and at all subsequent hearings. Copies of the PSI Report were given to counsel for the Defendant and State on May 21, 1981. On May 28, 1981 a hearing was held at which time the State offered evidence of a prior conviction of a felony involving the use of violence to the person. The Court received in evi-

dence the judgment of such conviction as well as a transcript of testimony of the victim in the trial leading to such prior conviction. The Defendant was then offered the opportunity to present any evidence he might have and to respond to the PSI Report. The Defendant declined to present any evidence or otherwise respond to the PSI Report; however, counsel for the Defendant presented arguments on his behalf. Counsel for the State presented arguments on behalf of the State. This Court then took the matter of sentence under advisement and scheduled a hearing for imposition of sentence on June 4, 1981.

On June 4, 1981, the Defendant appeared with counsel and was informed by this Court of the accusation against him and of the judgment and of his right of allocution. The Defendant showed no cause authorized by law why sentence should not be pronounced and imposed upon him.

This Court in reaching its sentence has considered the facts heard during the trial and during the separate sentencing proceeding, the evidence of prior conviction presented by the State on May 28, 1981, the new PSI Report (other than portions stricken, see record of hearing held May 28, 1981), has carefully considered the arguments presented by counsel, and has weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of jury, finds that sufficient aggravating circumstances exist to justify the death sentence and that the mitigating circumstances are insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case. The Court makes the following findings of fact upon which the sentence of death is based:

There exists in this case two aggravating circumstances as contemplated by Section 921.141(5), Florida Statutes, viz, subsections (5)(b) and (5)(h).

In respect to subsection (5)(b), the State during this resentencing procedure presented evidence of the Defendant's prior convictions in the Circuit Court of Orange County, Florida, Case No. CR 75-1305 wherein the Defendant was convicted upon jury verdicts of the crimes of forcible carnal knowledge, a violation of Section 794.01, F.S., 1973

and aggravated battery, a violation of Section 784.045, F.S., 1973. These crimes were committed on the 9th day of February, 1974, and the jury returned its verdicts on August 13, 1975. In the case before this Court the homicide was committed in August, 1973, but the Defendant was not brought to trial until January, 1976; however, the conviction predates the conviction in this case and consequently comes within the terminology of subsection (5) (b), viz, "The defendant was previously convicted of . . . a felony involving the use . . . of violence to the person." In the criminal episode in Orange County it appears that the victim was sexually battered and then stabbed with a knife a number of times about the neck and head. During the sentencing portion of the trial in this case the State attempted to introduce for the jury's consideration the record of this prior conviction. At the time of this trial the Court was advised that the Orange County conviction was on appeal and counsel for the Defendant urged upon this Court that such conviction could not be viewed as final until the Appellate Court had rendered its opinion. Out of what now appears to have been an over abundance of caution this Court sustained the objection of Defendant's counsel and did not permit the jury to consider the prior conviction in Orange County in reaching its advisory sentence. Subsequent appellate decisions have now made it clear that Trial Courts may permit advisory juries to consider prior convictions as rendered in the Trial Courts without waiting the outcome of the appellate process. There is no way of knowing whether the fact of the Orange County conviction would have changed the jury's advisory sentence in this case; however, the fact of this prior conviction does appear to be a proper matter for this Court to consider in arriving at its sentence. There is no question that both the then existing charge of forcible carnal knowledge and aggravated battery qualify under subsection (5) (b).

In respect to whether the capital felony committed in this case was committed in such a manner as to bring it within the category of being "especially heinous, atrocious, or cruel", it appears to this Court and this Court so finds that the circumstances of this homicide fit within the definitions of

each of those terms. The record reflects that the Defendant told one of the State's witnesses that he had cut and removed the breasts of the victim while she was still living. In addition, the Defendant told the witness for the State that he had "cut the cunt out" of his victim while she was still living. The pain suffered by the victim prior to death must have been unspeakable. The mental agony that she suffered knowing for certain that she would be always less than a whole woman and probably knowing for certain that her death was imminent, must have been beyond comprehension. Such acts of the Defendant were atrocious which set this capital felony apart from the "norm" of capital felonies. Such actions were especially cruel as one cannot think of greater cruelty to be committed upon a woman. The word heinous being defined as "shockingly evil" is an especially appropriate characterization of the conduct of the Defendant. It might be possible that, absent medical examiner verification of such butchering (the victim's body was found 24 months after her death and in an advanced state of deterioration) one should not put too great a reliance upon what the Defendant may have stated in braggadocio fashion to his young companion. However, all of the evidence before the Court confirms that the Defendant was speaking factually. The youthful companion testified that he observed the body of the victim shortly after her death and found it to be "blood spattered". The stabbing of the victim in the Orange County case indicated that the Defendant's use of a knife to inflict torturous cuts upon his victims was his *modus operandi*. The Defendant when asked by a friend as to why he did it that way stated, "man that's my style". This crime appears to this Court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim".

This Court has considered the other statutory categories of aggravating circumstances and finds them inapplicable.

This Court has also considered each of the statutory categories of mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation that would give rise to any such mitigating circumstances.

It is the finding and judgment of this Court that the Defendant be put to death in the manner and means provided by law (Section 922.10, F.S.). The Court informed the Defendant of his right to appeal from this sentence.

**DIRECTIONS TO THE CLERK, SHERIFF AND COURT REPORTER:**

The Clerk of this Court shall file and record this judgment and sentence and shall prepare four certified copies of this record of sentence of death and the Sheriff of Seminole County shall send one such copy of this record to the Governor of the State of Florida (Section 922.09, F.S.). The Defendant is hereby remanded to the custody of the Sheriff of Seminole County, Florida who is directed to deliver the Defendant and the second certified copy of this conviction and sentence to the custody of the Department of Corrections to await the issuance by the Governor of a warrant commanding the execution of this sentence of death (Section 922.111, F.S.).

The Clerk of this Court shall forthwith furnish the third certified copy of this judgment to the Court Reporter taking said proceedings who is hereby directed, as expeditiously as possible, to transcribe the notes of all proceedings in the above cause, including all testimony, objections, arguments of counsel and the rulings of the court since the mandate remanding this case to this Court for resentencing, and oral imposition of sentence and to certify the correctness of the notes and of the transcript thereof and to file the notes and transcript, duly certified, and two copies of such transcript with the Clerk of this Court.

This judgment of conviction and sentence of death being subject to automatic review (Section 921.141(4), F.S.), the Clerk of this Court is hereby directed to make up a complete record on appeal of all portions of the entire original records, papers and exhibits, proceedings and evidence (See Section 921.141(4), F.S.) and two copies thereof and, after certification by the sentencing Court, the Clerk shall transmit the entire original certified record to the Clerk of the Supreme Court of Florida for automatic review and serve one copy thereof upon counsel for the Defendant on appeal. After the Clerk has filed a transcript of record on

appeal with the Appellate Court, counsel for the Defendant on appeal shall file his brief within the time provided by appellate rules. The Clerk of this Court shall forthwith furnish the fourth copy of this judgment to the Defendant's counsel on appeal.

The Defendant having been adjudged insolvent for purposes of appeal, Seminole County shall pay the costs of such transcripts and copies and the filing fee on appeal.

DONE AND ORDERED in open court in Seminole County, Florida this 4th day of June, 1981.

/s/

\_\_\_\_\_  
ROBERT B. MCGREGOR  
*Circuit Judge*

Attached and to be included in the appellate record is the Presentence Investigation Report prepared by the Department of Corrections and used, except for the stricken portions thereof, for the purpose of sentencing.

/s/

\_\_\_\_\_  
ROBERT B. MCGREGOR  
*Judge*

[Fingerprinting and certificate thereof,  
omitted in printing]



FLORIDA DEPARTMENT OF CORRECTIONS  
PRESENTENCE INVESTIGATION  
COUNTY SEMINOLE

[Caption omitted in printing]

I. OFFENSE

FIRST DEGREE MURDER (Sec. 782.04(1)(a) F.S.)

*Information Resume:* In the Circuit Court of the 18th Judicial Circuit of the State of Florida, for Seminole County, at the Spring term thereof, in the year, 1975, the Grand Jurors of the State of Florida: charge that on or about August 6, 1973, Joseph Robert Spaziano a/k/a "Crazy Joe," did unlawfully kill Laura Lynn Harberts, and said killing was from a premeditated design to effect the death of said Laura Lynn Harberts, contrary to Section 782.04(1)(a) Florida Statutes.

*Court Appearances:* On September 12, 1975, the Grand Jury returned an interim report and Indictment. The defendant was not present and State Attorney Abbott M. Herring advised the Court the defendant was incarcerated. Judge Williams ordered the Indictment filed and made public and ordered a Capias to be issued for the defendant's arrest.

On October 6, 1975, with neither the defendant nor his attorney present, Judge Cowart set trial for November 3, 1975, before Judge McGregor.

On October 17, 1975, the defendant's attorney entered an Application for Insolvency. Judge McGregor granted the motion and ordered the attorney not to exceed \$250.00 for any expenses at this time.

On December 8, 1975, Judge McGregor continued the trial to January 19, 1976.

On January 20, 1976, the defendant appeared in Open Court with his attorney for trial. The Court selected a twelve (12) man jury and two (2) alternates and the trial began. The trial proceeded with Judge McGregor presiding. On January 23, 1976, the trial was concluded when the jury returned the *verdict of guilty* of First Degree Murder. Judge McGregor *adjudged the defendant guilty*, remanded

him to custody and continued the bifurcated portion of the trial until January 26, 1976.

On January 26, 1976, the defendant appeared in Open Court with his attorney. The jury, after due consideration, returned a recommended verdict of Life imprisonment as the advisory sentence. Judge McGregor ordered a Presentence Investigation, continued the defendant in custody, and set sentencing for March 15, 1976.

On March 8, 1976, the Court continued the sentencing date until April 22, 1976.

*Circumstances:* On August 22, 1973, human remains were discovered in an area west of State Road 431 in Altamonte Springs and subsequently reported to the Seminole County Sheriff's Department. Investigation determined that two (2) bodies were involved. A female body, the most complete, had both breasts and the vagina mutilated.

Subsequent investigation determined that a missing persons report had been given to the Orlando Police Department listing Laura Lynn Harberts, white female, age 18, as missing since August 5, 1973. The description of Harberts fit that of the mutilated body discovered in Altamonte Springs. On August 24, 1973, the body of Laura Lynn Harberts was identified by Dr. Carson S. Kindall through the use of dental charts.

On August 27, 1973, authorities with the Seminole County Sheriff's Department and Altamonte Springs Police Department, Lt. George Abbigy and Sgt. Martindale, ascertained that the victim had a date with an individual named Joe; that Joe belonged to a motorcycle group; and further, that he lived in Seminole County.

On February 9, 1974, Orange County authorities received information that Vanessa Dale Croft, white female, age 16, had been beaten, raped, and left for dead. She identified one (1) of her assailants as Joseph Spaziano. Due to the similarity of the offense, Spaziano became a prime suspect in the Altamonte Springs incident.

On October 10, 1974, Anthony Frank Dilisio, a friend of Spaziano's, was interviewed by Lt. Abbigy concerning the rape and assault of the 16 year old girl in Orange County. Dilisio implicated Spaziano by maintaining that Spaziano

talked freely of his assaults on female hitchhikers and had taken Dilisio to various areas where he had left the mutilated bodies.

Further investigation by the Seminole County Sheriff's Investigators resulted in the Grand Jury Indictment.

*Defendant's Statement:* Completely denies any knowledge or involvement. He indicates that Dilisio does not like him and wanted revenge. Freely discussed his past and was candid concerning same.

## II. PRIOR ARRESTS AND CONVICTIONS:

DLE #: 01050185

*Juvenile:* None alleged nor determined.

*Adult:*

Date	Place	Charge	Disposition
7-10-63	PD, Rochester, N.Y.	Assault, 3rd	8-9-63 Elmira Reception Center—Suspended sentence—3 years probation—3-16-64 probation revoked—ERC Maximum 3 years

Apparently involved an altercation with a motorcycle gang who was bothering his girl friend. Police records failed to ascertain the actual circumstances with the aforementioned given to this investigator by the defendant.

Date	Place	Charge	Disposition
4-28-75	SO, Orlando, Fla.	Count I: Forcible Car-	8-13-75—Sentenced to life
		nal Knowl-	8-13-75—5 years to
		edge	run consecutive
		Count II: with sentence in	
		Aggravated Count I	
		Battery	

On 2-9-74, a complaint was received from Vanessa Dale Croft, white female, age 16, who reported that she had been beaten and raped. The victim reported that after entering a pickup truck at the insistence of two (2) males, one (1) later identified as Joseph Spaziano, she was forced at knife

point to lay on the floor of the truck while they drove to a building, later identified as the "Outlaws" club house. Spaziano and the other white male, alleged to be John Allen Beeker, took the victim into the bedroom and took her clothes off. The subjects beat on her and then one of them forced her to have intercourse while the other inserted his penis into her mouth. She was later taken to the living room of the house and forced on her hands and knees while one of them again had intercourse with her from the rear while the other watched. The twosome then took the victim back to the truck and drove the vehicle a considerable distance, stopping at a place alongside the road where there were high weeds. She was then assaulted again with Spaziano then placing her belt around her neck and she was choked unconscious, beat, and cut about the face and neck. She lost consciousness and when she finally regained her consciousness, dragged herself to the road and was assisted by a passing motorist.

Doctors at Florida Hospital reported multiple stab wounds around her eyes and neck. She was apparently left for dead by Spaziano and the other male. The other male was never positively identified. Joseph Robert Spaziano was identified by the victim after observing numerous pictures.

### *III. SOCIAL HISTORY: Birthplace: Rochester, New York*

*Family:* Father, Christopher Spaziano, Rochester, New York, is retired due to poor health. He had functioned as a yard superintendent for John C. Pikes, Rochester, New York. His mother, Rose Spaziano, resides with her husband, defendant's father, and functions as an Avon Saleslady. The defendant is the second oldest of seven (7) children. Purportedly, he set himself up as guardian for his sister, Barbara, and became overly protective. Barbara is very much interested in the welfare of her brother and indicates the entire family is concerned and quite upset. She indicated the defendant always got along well with all the family members, except for the normal amount of disagreements between father and son. No other immediate family members have had any difficulties with law enforcement.

The defendant lived with his family in Rochester until age twenty-four (24). He reported that at age 15 he and his cousin's husband decided to leave town and go to California and they ended up in New Jersey where they were labeled *runaways* and returned to their home. At age 20, he was struck by an automobile as a pedestrian and was hospitalized for a long period of time. He suffered severe head injuries and the left side of his face was paralyzed for a while. He voluntarily admitted himself to the Rochester State Hospital for evaluation as a result of the head injuries, complaining of mild depression and according to family members, exhibiting a slow personality change. Following his release from the hospital, he joined a motorcycle club in Rochester known as the "Hackers" which later became affiliated with Hells Angel's Motorcycle Club. The Hells Angels were dealing heavily in heroin and he decided to leave because he did not believe in the use of heroin. This belief was the result of a "bad trip" he took on his only use several years before. He reported his decision to leave Hells Angels resulted in the club members hanging him with handcuffs over a pipe in the basement of their club house where he was kept for three (3) hours. During this time, different members of the club burned him with cigarettes and whipped him.

At this time, he was living with his girl friend, Linda Deprey, in Rochester, having told her parents they were married. Linda's parents had race horses in Florida and the defendant left with Linda to come to Hollywood and live with her parents in 1969. They were subsequently married and eventually moved to Seminole County.

Following a separation and divorce, the defendant began going with Darcy Fauss. They lived together for a while in Orlando and left the Orlando area circa February, 1974, when he discovered that the law enforcement authorities were looking for him with a warrant. They traveled north to Rochester, New York. They arrived in New York on February 12, 1974, and about three (3) weeks later, the defendant went to Pennsylvania for a week, came back, and then left again for Pennsylvania. When he left this time, Darcy went to Florida and left the baby (hers) and later



flew back to Pittsburgh to meet with the defendant. At that time, he was in Butler, Pennsylvania, returned to St. Petersburg and picked up Darcy's furniture, returned to Pennsylvania, but the club house there had been raided so they went on north to Youngstown, Ohio, where they stayed a week.

*Education:* Completed the 8th grade in Rochester, New York. Reportedly repeated the 4th and 6th grades and subsequently was attending special classes for the next two (2) years. The defendant indicated he often skipped school and was involved in many fights while attending. He was last in attendance at Madison High School in March, 1961, when he was assigned to the school work program, which is designed for students having an IQ between 76 and 89 (dull normal range). He dropped out of school at this time in that all of his friends were leaving, obtaining jobs and driving cars.

*Marital:* Married Linda Deprey on February 7, 1970, in Broward County, Florida. They were divorced on August 15, 1972, with one (1) child, Mary Noel Spaziano, borne to this union and is currently residing with her mother. At the time of the divorce, the court set an amount of child support for the defendant to pay, but at that time, Linda declined the child support because she believed she wanted to break away completely from the defendant. The defendant has visitation rights which he has exercised since their divorce. He is described as a very attentive father and he thought "the sun rose and set on his daughter." Linda indicates that while she was married to the defendant, he was not a member of the "Outlaw" motorcycle club, but joined after their divorce.

*Residence:* The St. Petersburg residence is that of Darcy Fauss, the defendant's fiancée'. Previously lived with Linda in a trailer park located on State Road 476 next to Bel-Aire Homes. After a short period of time, they bought a home located at 404 Georgia Avenue, Altamonte Springs. Linda is still the owner of the home and it is rented to tenants. Previously the defendant experienced a somewhat nomadic existence following his departure from the familial situation.

*Religion:* Professes Catholic beliefs, non-attender.

*Interests and Activities:* He indicates he has always been interested in motorcycles. He reported he belonged to the motorcycle clubs in Rochester, New York, and joined the "Outlaw" motorcycle club in Broward County. His reference to "motorcycle club" is of particular note. He indicated that motorcycles are in his blood and he enjoys riding them and joined the motorcycle clubs for social activity and the *close brotherhood relationship* that exists. In a motorcycle club, it is like a family wherein all are brothers. They trust one another, defend each other, support each other and if there is trouble, and should one (1) of them get caught, if not even guilty, that individual will take the "rap" for the rest. He indicated the club shares everything they have with their fellow brothers. In many ways, he describes it as better than being with his own family. The motorcycle clubs have a lengthy history and have a notorious reputation. The defendant indicates that all of the adverse publicity has been sensationalized by the news media and is in essence a falsehood.

The defendant indicates he was never interested in reading, but for a long period of time was interested in drawing. He smokes tobacco moderately, drinks moderately and his use of drugs has been limited to marijuana except for one (1) incident with "acid" many years ago.

*Military:* None

*Health:*

*Physical:* Age 35; white male; dark complexion; black hair; brown eyes; 5'5" tall; weighs approximately 125 pounds, with a slender body build. Scars and tattoos consist of a Geisha Girl figure on his upper right arm; Lion-Tiger lower left arm; top of Indian totem pole on upper left arm; lower left arm word, "Outlaws."

*Mental:* He was involved in a rather serious accident when he was run over by an automobile as a pedestrian in Rochester, New York, at the age of 20. He was hospitalized for a considerable length of time and spent one (1) year convalescing. The defendant entered the Rochester State Mental Hospital for examination on December 30, 1967, as a result of injuries from this automobile accident. This was



a voluntary admission and he was taken to the hospital by his parents.

The defendant was given the Minnesota Multiphasic Personality Inventory which measures personality traits, but with the preface that the measurement of personality traits is still in an embryonic stage. Many measures of personality traits have questionable validity. This test is not free of these weaknesses; however, some have been adopted because it is the best that is available for our purposes. This is a computerized scoring and, therefore, eliminates a great deal of the unreliability. Same indicates that this individual tends to give socially approved answers regarding self-control and moral values, is touchy, overly responsive to opinions of others, inclined to blame others for his own difficulties and is somewhat rebellious or nonconformance. He avoids close personal ties, is dissatisfied with family or social life and is probably energetic and enthusiastic. He has varied interests, has a combination of practical and theological interests. He has a normal male interest pattern for work, hobbies, etc. and views life with average mixture of optimism and pessimism. He is probably not a worrier, tends to be relaxed regarding responsibilities and probably is socially outgoing and gregarious. He indicates few somatic complaints and has little concern about bodily health.

*Employment:* Same has been relatively unstable. He has worked several years as a mason's apprentice and while in Orlando, worked as a self-employed house painter and mason. He was unable to give specific dates of employment and verification was not possible.

*Economic Status:* Nothing of significance.

*Personal Statements:*

William R. Sharp, Assistant State Attorney, Orange County, Florida, reported, "I feel most strongly this defendant is a savage and violent person and constitutes an *extreme threat* to our community. It is my sincere belief that this defendant will not be rehabilitated by imprisonment."

Detective Joann Hardee, Orange County Sheriff's Department, stated, "I believe Joseph Spaziano should get the death penalty or a Life sentence consecutive with the Life

sentence and five (5) year sentence received in the Orange County Rape and Aggravated Assault convictions.

Thomas J. Lauricella, Investigator, Monroe County District Attorney Office, New York, reported he has known the defendant since 1965 because of his involvement with local police agencies. He further reported that the defendant is wanted for questioning in connection with four (4) unsolved homicides occurring in the Monroe County area during the past several years.

Jeff Kumorek, Gang Crime Section, Chicago Police, stated he knew of the subject's arrests there and also knew of four (4) homicides and three (3) bombings in which the subject is a suspect while a member of the "Outlaw" gang in Chicago.

Christopher Spaziano, father, stated he thought a change occurred after the serious accident. He stated his son's face was partially paralyzed and the eye and left side of his face was twisted as a result. He believed that the defendant was very conscious of it and it was over a year before he recovered. Many of his friends made quite a bit of fun of him at this time and the defendant began making funny faces and his father suggests that this was the time they began to call him "Crazy Joe." He further stated his son had been away from home for seven (7) or eight (8) years, but has always maintained close contact with the family.

Rose Spaziano, mother, stated her son had worked since he was 13 years of age. She said he did okay in school, but did not finish because his friends were all quitting. She also stated her son was a poor judge of character and if someone was nice to him, he would do anything for them. She stated she could not believe any Rape charge; that he always had more of a problem in keeping them (girls) away than getting them.

Linda Deprey Harrell, ex-wife, was somewhat reluctant to comment about her marriage to the defendant. She stated the defendant had experienced a serious injury in 1968 when he was struck by a car and he could not walk for some time and the defendant's mother stated his personality was never the same afterwards. In reference to her marriage, she said he was the boss and had his way. She further indi-

cated that the defendant had a good outgoing personality, but could not stand pressure and became very nervous when pressure was placed on him. She commented that the defendant was a good father to their child and she finds it hard to believe that he is capable of murder. She reported that while in New York she witnessed the defendant stop fellow gang members from beating a man to death and that this action by the defendant resulted in his being beaten up by the fellow gang members. She further remarked she witnessed another good deed by the defendant when he intervened when fellow gang members were attempting to rape a female. She stated, "If you told me he committed a robbery or something, I would believe it, but not a rape or murder. If he killed someone, I think it was an accident."

Darcy Fauss, defendant's fiancée, reported she knew the defendant for two and one-half (2-½) years before she started going with him in November, 1973. She indicated this was about two (2) months after the defendant became an "Outlaw." She stated they lived together beginning at this time, November, 1973, in a "split the rent," each do their own thing arrangement, for two (2) months and then they just went with each other. She advised she left Orlando with him in February, 1974, and spent the rest of 1974 until Spaziano's arrest in April, 1975, in Chicago, traveling and living with him.

#### V. COURT OFFICIAL'S STATEMENTS:

*Prosecutor:* Attached please find a typewritten statement regarding same.

*Defense Attorney:* No response has been received.

*Law Enforcement:* Lt. George Abbg, Seminole County Sheriff's Department, stated, "During the course of the investigation, many things came up concerning the defendant. Even many of his close friends considered him to have a depraved mind and that even though they were friends, they were very aware of him and indicated they were afraid of him. Many of his friends indicated the defendant's nickname, 'Crazy Joe', was not because he was crazy, but because of the things he did. He had bragged to one of the main witnesses in this murder case of all the girls he had killed and maimed and he believes that there are many bod-

ies that they have yet to recover. Certainly he should be sentenced accordingly.

## VI. ANALYSIS

Before the Court is a 35 year old, divorced, white male, who was found guilty by jury trial of First Degree Murder, with a recommended sentence of Life imprisonment.

He is admittedly a member of a motorcycle gang which, whether true or not, carries a very poor reputation within the Seminole and Orange counties area. Prior to his conviction in Seminole County, he was convicted of Rape in Orange County, and sentenced to Life imprisonment, plus five (5) years for Aggravated Battery. The defendant negates any direct involvement, but seems ready to accept the consequences. He talks freely, candidly, and described his activities with the motorcycle gang as a pleasurable experience. He was married to an attractive, well-educated individual with this union resulting in one (1) child and ending in divorce. Although child support was not requested, the defendant does assist occasionally and has visitation rights. His ex-wife still communicates with the defendant and seems to be uniquely interested in his welfare. His family members have stuck close by him and are very supportive.

I hereby certify the above is true and correct to the best of my knowledge and belief.

FLORIDA STATUTE NOS. F.S. 782.04(1)(a)

MINIMUM PENALTY : Life

MAXIMUM PENALTY : Death

DEPARTMENT OF CORRECTIONS

Probation and Parole Services

By: /s/

E. S. BEDELL, SUPERVISOR

ESB:gh

Date Dictated: 5-19-81

Date Typed: 5-21-81

No Confidential Section

The Presentence Investigation is not a public record and is available only to those persons as specified in *Rule 3.712* of the Florida Rules of Criminal Procedure.

## CONFIDENTIAL

Bedell

Date 4-30-81

To: Circuit Administrator  
Department of Corrections  
Probation and Parole Services  
115 N. Oak Avenue  
Sanford, Florida 32771

This is for your use only in your investigation of the named defendant and to be disclosed only through your report to the Judge having jurisdiction of the defendant or to the Pardon Board or the Parole Commission, when appropriate.

FROM: STATE ATTORNEY  
STATE *vs.* Joseph Robert Spaziano, a/k/a Crazy Joe  
CHARGE 1st Degree Murder  
INFORMATION NO. 75-430-CFA

The Department of Corrections, Probation and Parole Services, is conducting a presentence investigation on the above named. My synopsis of the facts and comments regarding this case and the defendant is as follows:

I recommend that the defendant Joseph Robert Spaziano a/k/a "Crazy Joe" be sentenced to death because the existence of two aggravating circumstances have been proved beyond a reasonable doubt and there are no statutory or nonstatutory mitigating circumstances that extenuate or mitigate the atrocity of this lust murder.

Although the jury recommended the defendant be sentenced to life, that recommendation should be rejected because the compelling reason that there are no mitigating circumstances, and because the homicide of Laura Lynn Harberts was especially heinous, atrocious or cruel. The jury did not behave reasonably when it recommended life for this heinous murderer when there were no mitigating circumstances extenuating or mitigating this heinous murder. Additionally, the sentencing jury did not have the benefit of the proof of the Orange county convictions of felonies done to Vanessa Dale Croft. With regard to the aggravating circumstances that this murder was especially heinous,



atrocious and cruel, the facts show that this murder was a conscienceless or pitiless crime that was unnecessarily torturous to the young woman Laura Lynn Harberts. The defendant said he had raped, stabbed, cut the breasts off and cut the cunt out of Laura. Laura experienced great physical and mental pain and suffering, because according to the defendant he raped her and then tortured her. One of the ways he tortured Laura was he cut her vagina out and showed it to her. It is unimaginable how such piquerism could be accomplished by a human being. Laura's expectation of doom was no doubt unmeasurable as she endured the butchery wrought on her by the defendant who sought to possess and dominate her body after death and thereafter to display braggingly his handiwork to another person, a young boy named Anthony Frank Dilisio.

Additionally, after this butchery on Laura Lynn Harberts, the defendant on 9 February 1974 engaged in a course of criminal conduct that in Case Number 75-1305 out of Orange County resulted in the defendant being convicted of a felony involving the use or threat of violence. The defendant forcibly placed his penis into the mouth of Vanessa Dale Croft and lacerated the eyes of Vanessa Dale Croft. There are two striking features of the character analysis of the defendant occasioned by this Orange County conviction. The first is that after the savagery on Laura Lynn Harberts during the period of time between August 5-16, 1973 the defendant continued his depraved venturings and savaged another young woman. The second feature is that defendant also was responsible for mutilation of another living person—this time the eyes of Vanessa Dale Croft. Fortunately, Venessa only lost a majority of the vision of her left eye whereas Laura lost her life. Laura became one of the defendant's girls in the finalty of time and space. The bestiality shown in the heinous murder of Laura and the mutilating sex act of Vanessa demonstrate convincingly that there really can only be one punishment which will adequately measure up to the monstrous evil perpetuated by this defendant in the dark lamentable catalogue of human crime and that is DEATH by electrocution.

/s/

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 ASSISTANT STATE ATTORNEY

## Supreme Court of Florida

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No. 50,250

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JOSEPH ROBERT SPAZIANO, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

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[May 26, 1983]

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant following a resentencing hearing ordered by this Court in *Spaziano v. State*, 393 So. 2d 1119 (Fla.), *cert. denied*, 454 U.S. 1037 (1981). We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm.

Appellant was convicted in 1976 of the first-degree murder of Laura Harberts. The testimony at appellant's trial revealed that appellant "often bragged about the girls he had mutilated and killed," and that on one occasion he had taken two individuals to a dump site to show them two corpses to substantiate his claim of responsibility for the murders. One of the individuals accompanying appellant to the dump site later directed police officers to the bodies, one of which was identified through the use of dental records as being that of Miss Harberts.

The jury recommended that appellant be sentenced to life imprisonment. The trial judge, at the initial sentencing proceeding, ordered and considered a presentence investigation report. He imposed the death sentence, finding two aggravating circumstances: (1) that the offense was committed in a manner which was heinous, atrocious, and cruel; and (2) that the defendant was previously convicted of felonies involving the use or threat of violence to the person. These felony convictions were listed in the presentence investigation report, and included two convictions discussed



in a confidential section of the report which the appellant was not given the opportunity to explain or deny.

On appeal, we affirmed appellant's conviction, but remanded for resentencing to comply with the dictates of *Gardner v. Florida*, 430 U.S. 349 (1977), which was decided after the trial of this case.

Following our remand, the trial judge ordered a new presentence investigation report and conducted a hearing to provide appellant the opportunity to respond to the report. Following this sentencing hearing, the trial judge reimposed the death sentence, once again finding two aggravating and no mitigating circumstances. Appellant raises five asserted errors in the resentencing proceedings.

Appellant first contends that at the resentencing hearing the trial judge improperly allowed the state to introduce new evidence in support of an aggravating circumstance. In the original sentencing phase, the trial judge rejected the state's proffer of evidence to the jury which established the appellant's conviction of forcible carnal knowledge and aggravated battery because the conviction was then on appeal. This information was also contained in the original presentence investigation report. Upon remand, because this conviction was affirmed on appeal, the trial judge did consider it as an aggravating circumstance in the resentencing proceedings. Appellant contends that the consideration of this conviction improperly expanded the scope of the remand in violation of *Songer v. State*, 365 So. 2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979), and *Dougan v. State*, 398 So. 2d 439 (Fla.), *cert. denied*, 454 U.S. 882 (1981), and in effect allowed the state to reopen its case to prove additional aggravating factors in the sentencing phase in violation of the double jeopardy rule set out in *Bullington v. Missouri*, 451 U.S. 430 (1981). We reject this contention.

Neither *Songer* nor *Dougan* is applicable here. In each case this Court rejected appellant's attempt to expand the *Gardner* remand proceedings beyond the limited purpose of explaining or denying the contents of the presentence investigation report by either calling character witnesses whose testimony was not relevant to the report or by at-

tempting to create a full-blown sentencing proceeding. The conviction considered by the court in the resentencing proceedings was in fact contained in the original presentence investigation report and the trial judge could have properly considered this conviction during the original sentencing phase. In *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981), we held that a trial judge could take into account convictions which were on appeal at the time of sentencing. Not only could the trial judge have considered the appellant's conviction in the original proceeding, but the information of the conviction as an aggravating circumstance was previously before the court. This circumstance does not expand the scope of the remand by allowing the state to introduce new evidence. The evidence clearly had been submitted in the initial proceedings. We hold that the trial judge may properly apply the law and is not bound in the remand proceedings by a prior legal error. (We note *Peek* was decided subsequent to the first trial.) There was no *Bullington* double jeopardy violation and appellant was given a full opportunity to explain or deny the conviction in the resentencing process.

Appellant secondly contends that the trial court erred in considering the appellant's previous convictions for felonies involving violence, when such convictions were not presented to the jury for consideration in the original sentencing proceedings. According to the appellant, the trial judge's actions were violative of section 921.141, Florida Statutes (1973), Florida's death penalty provision, and the eighth and fourteenth amendments of the United States Constitution. The appellant's contention is without merit. In *White v. State*, 403 So. 2d 331, 339 (Fla. 1981), we upheld a sentence of death imposed by the trial judge in the face of the jury's recommendation of life where the trial judge "noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." Because the aggravating circumstances outweighed any possible mitigating circumstances, the trial judge concluded that the death sentence was ap-

propriate and we affirmed. We reach the same conclusion in this case.

Third, appellant contends that the trial court erred in overriding the jury's recommendation of life because the aggravating circumstances considered by the trial judge were improper. We have already discussed and approved the aggravating circumstance of a prior conviction of a violent felony. We also conclude that the other aggravating circumstance, that the murder was heinous, atrocious, and cruel, was properly determined by the trial judge to be applicable to this case. One of the individuals who accompanied the appellant to the dump site to view the two corpses testified that the bodies were covered with "quite a bit" of blood and he could see cuts on the breasts, stomach, and chest. The witness further testified that appellant told him of how he tortured the victim with his knife while she was still living. This testimony of appellant's treatment of his victim clearly places his acts within the category of "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" so as to set this "crime apart from the norm of capital felonies." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, including the prior conviction of a violent felony which the jury did not have an opportunity to consider, meets the clear and convincing test to allow override of the jury's recommendation in accordance with previous decisions of this Court. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

Fourth, the appellant contends that the imposition of the death sentence following a jury recommendation of life imprisonment violates the double jeopardy protections of the fifth amendment of the United States Constitution and conflicts with *Bullington v. Missouri*, 451 U.S. 430 (1981). *Bullington* is not applicable to this case. The Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing, as was the Missouri procedure in *Bullington*. More important, however, this is not a case in which the appellant has been granted a new trial and has been resentenced by a new jury. This Court has al-

ready decided the double jeopardy issue raised by appellant. In *Douglas v. State*, 373 So. 2d 895 (Fla. 1979), it was argued that "a jury's life recommendation is tantamount to a judgment of acquittal of a crime for which a death sentence is appropriate, because it reflects either an absence of proven aggravating circumstances or an absence of proof that the aggravating circumstances outweigh any mitigating circumstances." *Id.* at 896. We rejected this argument in *Douglas* for two reasons. First, the jury's function under the Florida death penalty statute is advisory only. See *Proffitt v. Florida*, 428 U.S. 242 (1976). Second, allowing the jury's recommendation to be binding would violate *Furman v. Georgia*, 408 U.S. 238 (1972).

Fifth, the appellant contends that he was denied due process because the resentencing proceedings were not assigned to a new judge. The trial judge denied appellant's motion for substitution of judge in the resentencing proceedings. Appellant contends that a sentencing judge who has heard and relied upon improper evidence in imposing a death sentence cannot without difficulty consider proper factors on resentencing without also considering the improper evidence. To adopt this assertion would mean that whenever a defendant must be resentenced in any proceeding, a new judge must be assigned. We note that appellant offers no evidence of bias or prejudice on the part of the sentencing judge other than the fact that he was the trial judge in this case. In *Douglas v. Wainwright*, 521 F. Supp. 790 (M.D. Fla. 1981), the court rejected a similar argument, finding that the sentencing judge's statements showed that improper convictions were not used against the defendant in sentencing. The court in *Douglas* followed *United States v. Gaither*, 503 F.2d 452 (5th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975), which held that it is not inherently impossible for a court to disclaim consideration of an improper conviction in sentencing while still having knowledge of the conviction. We conclude that the evidence in the instant case clearly indicates that the sentencing judge properly disregarded the information in the original presentence investigation report in resentencing appellant.

For the reasons expressed, we affirm the imposition of the death sentence.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and  
EHRlich, JJ., Concur

McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-  
HEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting

I dissent on the sentence of death primarily because the jury recommended life. I see no compelling reason to override that recommendation. The jury viewed this defendant and listened to the details of this homicide. They could conclude that a life sentence is appropriate. After all, Spaziano was known as "Crazy Joe." When he was 20 years old he was involved in a serious accident. Ever since then he has not been "normal." The jury could well find that he was entitled to the statutory mental mitigating factors. The bizarre and gross nature of this homicide is supportive of that finding. Certainly on factual disputes the trial judge, and we on review, should yield any contrary beliefs to that of the jury. I would remand with instructions to impose a life sentence without eligibility for parole for twenty-five years.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, JULY 13, 1983

---

Case No. 50,250

Circuit Court Case No. 75-430-CFA  
(Seminole)

JOSEPH ROBERT SPAZIANO,  
APPELLANT,

v.

STATE OF FLORIDA,  
APPELLEE

---

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and  
EHRlich, JJ., Concur }  
McDONALD, J., Dissents

[JURAT OMITTED IN PRINTING]



**Supreme Court of the United States**

No. 83-5596

---

JOSEPH ROBERT SPAZIANO,  
PETITIONER

v.

FLORIDA

---

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 9, 1984

**ORIGINAL**

No. 83-5596

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

**RECEIVED**

**NOV 19 1983**

**OFFICE OF THE CLERK  
SUPREME COURT, U.S.**

JOSEPH ROBERT SPAZIANO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.

**FILED**

**NOV 19 1983**

WILLIAM L. STEVENS  
CLERK

RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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✓

QUESTIONS PRESENTED

I. Whether a petition for certiorari which merely duplicates a previously filed petition, which was denied and for which rehearing was denied, should be entertained or granted.

II. Whether Petitioner has established any basis for reconsideration of Barclay v. Florida.

III. Whether Petitioner's Personal theory regarding the reasons judges sometimes override advisory sentences constitutes a legal basis for review.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

---

JOSEPH ROBERT SPAZIANO,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 433 So.2d 508 (Fla. 1983). The prior opinion of the Florida Supreme Court is reported at Spaziano v. State, 393 So.2d 1119 (Fla. 1981) cert. denied 454 U.S. 1037 (1981) reh. den. \_\_\_ U.S. \_\_\_, 102 S.Ct. 1041 (1982).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

Respondent agrees that this petition raises issues concerning the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, §§ 921.141 and 932.465, Florida Statutes and Rule 3.490, Florida Rules of Criminal Procedure.

## STATEMENT OF THE CASE

Joseph Spaziano, a member of the Outlaws motorcycle Gang, was convicted in 1976 of the first degree murder of Laura Harberts and sentenced to death.

Spaziano's conviction and death sentence were reviewed by Florida's Supreme Court. Spaziano v. State, 393 So.2d 1119 (Fla. 1981) cert. denied 454 U.S. 1037 (1981) reh. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1041 (1982).

In his direct appeal to Florida's Supreme Court, Spaziano challenged the general sufficiency of the evidence used to convict him, the court's giving of a "dynamite" charge, alleged improper arguments by the prosecution, alleged limitations on his right of cross examination and an attack upon his death sentence. The latter attack challenged the findings of certain aggravating circumstances; the general constitutionality of the Florida death penalty statute, and a Gardner<sup>1</sup> violation.

After filing his initial brief, Spaziano filed a "Notice of Supplemental Authority" citing Beck v. Alabama, 447 U.S. 625 (1980).

The Florida Supreme Court remanded the case for resentencing pursuant to its finding that the dictates of Gardner had been violated. The trial judge ordered a new presentence investigation and Spaziano was permitted to respond. The death sentence was reimposed.

While on remand, however, Spaziano petitioned this Honorable Court for certiorari review. The question presented for review was:

"Whether the State of Florida has violated the due process and equal protection clauses of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to The Constitution of the United States by arbitrarily denying to persons charged with first degree murder who were prosecuted after the statute of

1. Gardner v. Florida, 430 U.S. 349 (1977).



limitations had run on all lesser degrees of murder and manslaughter the right that is conferred on all persons charged with degree crimes in Florida; to have the jury charged on all lesser degrees of murder and manslaughter."

In petitioning for certiorari, Spaziano noted that the "identical" legal issue had been raised by petition for certiorari (also denied) in Holloway v. Florida.<sup>2</sup>

Significantly, Spaziano also argued:

"The effect of the classification in the instant case has been that Petitioner has been sentenced to die as the trial judge overruled the only safeguard left to Petitioner's jury - the advisory sentence of life imprisonment. Such an invidious result cannot be squared with Constitutional guarantees."

Certiorari was denied, as was rehearing.

Spaziano's death sentence was reimposed and was reviewed by the Florida Supreme Court. Spaziano v. State, 433 So.2d 508 (Fla. 1983).

Spaziano's second review addressed the "scope" of the Court's original remand, the "failure" of the trial judge to recuse himself on remand, another alleged Gardner violation, the sufficiency of the evidence in support of the finding that the murder was especially heinous, atrocious or cruel, and a claim that any override of a jury's advisory sentence violates the Fifth, Eighth and Fourteenth Amendments.

These arguments were rejected, and rehearing was denied on July 13, 1983.

It must be noted that when Spaziano first petitioned this Honorable Court for certiorari review, he raised the Beck issue. In petitioning for rehearing in this Court, Spaziano argued:

"The Petitioner, who has been sentenced to death by electrocution, respectfully moves this Court for an order vacating its November 9, 1981 denial of his petition for a writ of certiorari to the Supreme Court of Florida..."

2. Holloway v. Florida, 362 So.2d 333 (Fla. 3d DCA 1978), cert. den. 379 So.2d 953 (Fla. 1980), U.S. cert. den. 449 U.S. 905 (1980).

Rehearing was denied on January 11, 1982.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied inasmuch as the Petitioner has failed to present any legal basis for this Honorable Court to reconsider its prior, controlling decisions on the questions raised.

ARGUMENT

A PETITION FOR CERTIORARI WHICH MERELY DUPLICATES A PREVIOUSLY FILED PETITION, WHICH WAS DENIED AND FOR WHICH REHEARING WAS DENIED, SHOULD NOT BE ENTERTAINED OR GRANTED.

It is suggested that if the rules of this Honorable Court disallow successive motions for rehearing, those rules cannot be circumvented or frustrated by the filing of repetitious, successive petitions for certiorari. To permit the rehearing rule to be frustrated by the filing of duplicate, de novo petitions would render impossible either finality of litigation or management of the court's burgeoning caseload.

Mr. Spaziano states that his case has now "changed" because he was resentenced to death, and, therefore, that new life has been breathed into his claim that he is entitled to relief under the decision in Beck v. Alabama, 447 U.S. 625 (1980). The State of Florida respectfully disagrees for a variety of reasons.

First, the tone of the Petitioner's argument implies that serious consideration of his petition can only occur now that he has been resentenced to death. The obvious implication of this is that the Supreme Court either casually rejected his first petition or did not put serious effort into its decision. The State cannot accept an argument that this Court does not seriously or conscientiously perform its duty.

Second, the State rejects the argument that Spaziano has "now" been sentenced to death, and as a result his case has changed. As noted above, when Spaziano petitioned for

rehearing last time he filed this identical petition, he represented to this court that he was under sentence of death by electrocution. Technically, of course, his death sentence was subject to "resentencing." However, in terms of how this petition was presented or the gravity of the case, it was presented then, as now, as a petition filed on behalf of one sentenced to death. Therefore, the petition has been refiled in this court in precisely the same posture as it was before.

Third, it is suggested that the mere imposition of sentence has no bearing on the so-called Beck v. Alabama issue. That case addressed the issue of jury instructions during the guilt-innocence stage of a murder trial. Last time Spaziano was here, he had been adjudicated guilty after the so-called Beck error. The claim of error was rejected by this Honorable Court.

The "error," therefore, related to the conviction, not the sentence, and cannot be revived merely because of the sentence.

Fourth, of course, is the basic fact that no novel issues are presented by this duplicate petition.

Beck v. Alabama, 447 U.S. 625 (1980) dealt with statutory prohibitions against the giving of applicable instructions as to lesser degrees of the offense charged.

This case involves the giving of jury instructions on lesser degrees of murder when the statute of limitations has run on those offenses, and thus the lesser degrees were not proven or supported by the evidence.

When the statute of limitations has run on the lesser degrees of murder, jury instructions on the lesser degrees are not required, nor are they even proper. Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978) cert. den. 379 So.2d 953 (Fla. 1980), U.S. cert. denied 449 U.S. 905, 908 (1980).

Interestingly, when this Honorable Court denied certiorari in Holloway, Mr. Justice Blackmun noted in dissent:

"The legal question may be determined by whether the defendant himself chooses to invoke a statute of limitations defense."

Contrary to the arguments of Mr. Spaziano in his first petition and in this duplicate petition, Spaziano was not "refused" instructions on the lesser degrees of murder. Rather, Spaziano adamantly protested the giving of those instructions and demanded that they not be given.

Spaziano, it seems, invoked a statute of limitations defense as to all lessers, and insisted on presenting the case to the jury on an "all or nothing" basis.

Having chosen his strategy, he cannot be relieved of the consequences of his choice now, simply because he lost.

Finally, Mr. Spaziano may contend that he was deprived of the "jury pardon" phenomenon by the court's acquiescence to his demand. Nothing exists of record reflecting a desire on the part of the jury to pardon Spaziano. If it had wanted to do so, or felt that the level of proof did not rise to "first degree" murder, it would have acquitted him.

The State also questions the propriety (if nothing else) of a system whereby a jury could be misled into believing it had the option to convict a murderer of a lesser degree of murder, giving that defendant a "break" in the form of a lighter sentence, but not just letting him go free, when in fact their "limited pardon" would in fact serve as a full pardon. Can such deception be justified? Or would this practice have a chilling effect on all "jury pardons"?

This first argument, it is submitted, abuses the writ to the extent that it merely duplicates an earlier petition, is factually incomplete, and legally without merit.

II. THE PETITIONER HAS FAILED TO ESTABLISH  
ANY BASIS FOR RECONSIDERATION OF BARCLAY  
V. FLORIDA, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418  
(1983).

The "federal question" purportedly raised by Mr. Spaziano's second argument is unclear.

It is given that the jury override is constitutional. See Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418 (1983); Dobbert v. Florida, 432 U.S. 282 (1982); Proffitt v. Florida, 428 U.S. 242 (1976). What, therefore, is Petitioner arguing?

It would appear that this argument is nothing more than a bare assertion that Mr. Spaziano disagreed with the trial judge's decision after that judge weighed the evidence.

It is suggested that the "weight of the evidence" is no more a proper subject for certiorari review than it is for appellate review. This Honorable Court has never agreed to reweigh evidence based upon cold transcripts and replace state court findings of fact with its own. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981), \_\_\_ U.S. \_\_\_, 102 S.Ct. 1303 (1982).

The Petitioner's mere disagreement with the decision of the trial judge, as affirmed by Florida's Supreme Court, is not a basis for certiorari review, nor does it justify reconsideration of the decisional law of this Honorable Court.

III. NO ARGUABLE BASIS FOR GRANTING  
CERTIORARI EXISTS ON THE BASIS  
OF SPAZIANO'S PERSONAL BELIEF AS  
TO WHY JUDGES DO NOT BLINDLY  
FOLLOW ALL ADVISORY VERDICTS.

After conceding that the jury override is constitutional, Mr. Spaziano asks for certiorari review of "jury overrides" because of four personal suspicions, to wit:

- (1) "The nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross-section of the community whose outrage is being expressed; (petition page 24)



- (2) "Judges have no special expertise and in fact juries are the true "experts" on whether death is appropriate in any given case."  
(page 24)
- (3) "The practice of overturning a jury's penalty is contrary to the overwhelming national practice since at least 1948." (page 24)
- (4) "It is also contrary to the great weight of professional legal opinion."  
(page 24).

It is interesting that in Mr. Spaziano's appellate brief to the Florida Supreme Court, at page 34, (appendixed), Mr. Spaziano waived any argument on the propriety or constitutionality of a trial judge's decision to override a jury suggestion of life.

Having waived this argument in Florida's Supreme Court, it should not be entertained de novo in this court.

Mr. Spaziano's four social theories about how and why death is imposed and "who knows best" to impose it are interesting but hardly legal.

The issue of whether judges should be blinkered and bound by jury suggestions, for or against death, was decided against Spaziano in Furman v. Georgia, 408 U.S. 238 (1972) as well as Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418 (1983); Dobbert V. Florida, 432 U.S. 282 (1982) and Proffitt v. Florida, 428 U.S. 242 (1976).

It is submitted that judges can, and do, overturn advisory sentences favoring death regularly. While Mr. Spaziano may not agree with the override procedure, many of his fellow murderers undoubtedly welcome it. Be that as it may, however, the fact remains that this issue was waived in Florida's Supreme Court and in any event has not been shown to be ripe for (yet another) certiorari review.

#### CONCLUSION

Mr. Spaziano's three points represent nothing more than his personal desire to have this court review and reject

a significant body of its own decisional law.

Certiorari should not be granted for many reasons:

First, this petition was already denied (as was rehearing) once. One cannot circumvent the prohibition against multiple requests for rehearing by filing new petitions.

Second, his petition rests largely upon his personal interpretation of the evidence adduced at trial and at sentencing, an interpretation that, not surprisingly, differs from the verdict. This is not a trial court.

Third, Spaziano's pet social theories about why judges override jury suggestions do not constitute either new, credible argument or a basis for revisiting similar arguments previously rejected.

Fourth, Spaziano declined to argue the jury override issues presented in his third argument to Florida's Supreme Court.

In sum, there is no legal or factual reason to grant certiorari.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

---

JOSEPH ROBERT SPAZIANO,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

---

CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To The Supreme Court Of Florida, Brief For Respondent In Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

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All parties required to be served have been served on this 14th day of November, 1983.

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IN THE  
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JOSEPH ROBERT SPAZIANO,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

Supreme Court, U.S.  
FILED

NOV 30 1983

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REPLY AND SUPPLEMENTAL BRIEF  
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1983

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JOSEPH ROBERT SPAZIANO,  
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STATE OF FLORIDA,  
Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF FLORIDA

REPLY AND SUPPLEMENTAL BRIEF  
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The brief in opposition filed by Respondent merits a few words in reply.

I. THE "BECK ISSUE"

Respondent's argument is premised on the Motion that "the mere imposition of sentence has no bearing on the so-called Beck v. Alabama issue." The State appears to contend that when the validity of Petitioner's conviction was before this Court in 1980, this really was a capital case, even though "technically" Petitioner's death sentence had, at that time, been vacated by the Florida Supreme Court.

The short answer is that this was not a death case in 1980 simply because at that time Petitioner was not under sentence of death. Where Petitioner was at that time before this Court only for review of his conviction, since the Florida Supreme Court had vacated his death sentence, he is now seeking review of the reimposed death sentence. It is precisely this new posture which brings the issue presented squarely within the Eighth Amendment standards of reliability enunciated by this Court in Beck.

The difference between the posture of the case then and its posture now is crucial. The proof of this proceeds in two stages: first, failure to instruct on lesser offenses raises

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special dangers of factfinding inaccuracy and unreliability and second, this enhanced unreliability, though undersirable in noncapital cases, rises in capital cases to the level of being an infirmity of constitutional magnitude.

This Court has recognized that deprivation of a lesser-offense instruction is detrimental to the defendant's interest in reliable jury factfinding. The Court reasoned in Keeble v. United States, 412 U.S. 205, 212-213 (1973) that "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." This is simple common sense. It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which Petitioner's jury was placed. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater. In the context of a murder trial a Florida jury is likely to compromise its adherence to the reasonable doubt standard rather than subjugate its moral outrage.

It is, of course, true that the risk of erroneous results can never be totally eliminated from our necessarily imperfect legal system. But only in capital cases is it clear that the need for reliability rises to the level of constitutional imperative. Death is different, and the infliction of death by official choice must require a higher degree of reliability than we can practicably require of all other aspects of law. This in fact was the basis of Beck v. Alabama, where this Court made clear that when the evidence established that the defendant is guilty of "a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of conviction of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated when the defendant's life is at stake.

As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments." 447 U.S. 625, 638 (1980) (emphasis added). "To ensure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination ... Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [Florida] is constitutionally prohibited from withdrawing that option from the jury in a capital case." Id.

Thus, it matters very much that now this is a death case. It matters because the dangers sought to be averted by Beck's holding quite apparently came true in the present case. The jury, which had considerable difficulty in reaching a verdict on guilt after a number of hours of deliberation -- interrupted with judicial inquiry, reported deadlock and an "Allen" charge had little difficulty in issuing an almost immediate sentencing verdict of life imprisonment. The evidence supporting guilt was at best inconclusive -- there was virtually no evidence as to the degree of the homicide and only weak circumstantial evidence that Petitioner was actually involved in the offense -- yet the jury was faced with a murder that was portrayed as brutal and provided with only two options: guilt of first degree murder or not guilty. The jury did not have the "third option" mandated by Beck. Under these circumstances the jury exercised the only reasonable option it had available: it found Petitioner guilty of first degree murder but issued a sentencing verdict of life imprisonment. This life verdict, however, was overridden by the trial judge who imposed the death sentence on Petitioner. The Florida Supreme Court affirmed the death sentence.

Accordingly, the danger of unreliability came true in this case. The trial judge's instruction presented an impossible Hobson's choice to the jury, a jury confronted with flimsy evidence of first degree murder. The refusal to instruct on lesser offenses prevented the jury from finding Petitioner guilty of a lesser offense, which it had the exclusive right to do and for which there was a reasonable construction of the evidence.



For example, the jury might well have believed that Petitioner was somehow involved and knew about the homicide yet found the evidence insufficient to support the essential element of premeditation. Since there were no lessers, the jury should have acquitted, yet, as this Court has recognized, where a defenant is guilty of some offense the jury is more likely to resolve its doubts in favor of conviction. Petitioner's jury had only one safeguard against the possibility of innocence of first degree murder: to find Petitioner guilty but to recommend life. That is exactly what his jury did.

## II. THE JURY OVERRIDE AS APPLIED TO THIS CASE

Petitioner will rely upon the discussion in his initial petition.

## III. THE FACIAL CONSTITUTIONALITY OF THE JURY OVERRIDE

Petitioner will rely upon his initial petition, except to challenge Respondent's contention that this issue has been somehow waived. The single, out of context sentence in Petitioner's Florida Supreme Court brief, upon which Respondent bases its contention, is no more than an acknowledgment, also made in our certiorari petition, that "this Court has suggested that the override is constitutional." Petition for Certiorari Petitioner at 21. Petitioner is aware that lower courts have read this Court's decisions in Proffitt, Dobbert, and Barclay as foreclosing the issue. Id. Most recently, in Douglas v. Wainwright, 714 F.2d 1532, 1552-53 (11th Cir. 1983), the eleventh circuit held that "whatever the merit of appellant's claim ... under the decisions in Barclay, Dobbert , and Proffitt, the system of overriding jury reconsiderations of life imprisonment is not unconstitutional." It is for this reason that only this Court can revisit the issue. Petitioner respectfully asks this Court to do just that.

Moreover, it is clear from Petitioner's motion for rehearing before the Florida Supreme Court that the facial validity of the jury override was in issue. Petitioner there argued:

In permitting the death sentence to be imposed over the jury's life verdict on the basis of information not presented to the jury, this Court has derogated the constitutional role of the jury in Florida's capital sentencing system. Findings regarding the presence or absence of aggravating or mitigating circumstances are findings of fact as to which a defendant has a Sixth Amendment right to trial by jury. By allowing a death sentence to be imposed upon facts not presented to the jury, the Sixth Amendment guarantee is abrogated. The principle that death sentences may be imposed only through the intervention of a jury is fundamental to our jurisprudence and provides an essential assurance against disproportionality, excessiveness and arbitrariness in capital sentencing. Cf. Lockett v. Ohio, 438 U.S. 586, 609 (1978) (reserving the question regarding the constitutional need for jury sentencing).

The issue of the facial validity of the override was squarely presented to the court below.

#### CONCLUSION

The Petition for Certiorari should be granted.

Respectfully Submitted,

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IN THE  
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OCTOBER TERM 1983

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Petitioner,

vs.

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Respondent.

=====

CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of  
the Bar of the Supreme Court of the United States, and that I  
have served a copy of the Reply and Supplemental Brief in Support  
of Petition for Writ of Certiorari on counsel for respondent by  
depositing the same in the United States mail, first class  
postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this  
\_\_\_\_ day of November, 1983.

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**FEB 23 1984**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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JOSEPH ROBERT SPAZIANO,

*Petitioner,*

v.

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*Respondent.*

---

On Writ Of Certiorari To The  
Supreme Court Of Florida

---

**BRIEF FOR PETITIONER**

---

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### QUESTIONS PRESENTED

1. Whether a death sentence imposed after a jury verdict of guilty of a capital offense violates the Eighth Amendment and the Due Process Clause where the jury was precluded under the state statute of limitations from considering a verdict of guilt of noncapital lesser included offenses though the evidence would have supported a verdict on such an offense?

2. Whether a trial judge's override of a jury's factually based decision against the death penalty contravenes, in all cases, the Fifth, Sixth, Eighth and Fourteenth Amendments?

3. If the override of a jury's life verdict is constitutional on its face, are the Florida standards for the override applied in a manner that discounts the jury's consideration of mitigating factors and that is so broad and vague as to violate the constitutional requirement of reliability in the determination that death is the appropriate punishment in a particular case?

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<i>Washington v. Watkins</i> , 655 F.2d 1346 (5th Cir. 1981), <i>reh. den. with opinion</i> , 662 F.2d 1116 (5th Cir.), <i>cert denied</i> , 456 U.S. 949 (1982) .....	41
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Fla. R. Crim. P. 3.780 .....	44
Fla. R. Crim. P. 3.988 .....	43
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American Bar Association, Minimum Standards in Sentencing .....	42
American Bar Association, Project on Standards for Criminal Sentencing, Sentencing Alternatives and Procedures (Draft 1968) .....	36
American Bar Association, Standards Relating to Trial by Jury (1968) .....	14
American Law Institute, Model Penal Code (Prop. Off. Draft 1962) .....	37, 46
Berns, For Capital Punishment (1979) .....	30
Bowers, Executions In America (1974) .....	24
Cohen, Reason and Law (1950) .....	30
Goodhart, English Law and the Moral Law (1953) ....	30
Kalven & Zeisel, The American Jury (1966) .....	32
Packer, The Limits of the Criminal Sanction (1968) ...	30
Partridge & Eldridge, The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit (Wash., D.C., Federal Judicial Center 1974) .....	43
President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force Report, The Courts (1967) .....	36



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Royal Commission on Capital Punishment, 1949-1953 (1953) .....	30, 37, 46
Rubin, <i>The Law of Criminal Correction</i> (1973) .....	37
Stephen, <i>A General View of the Criminal Law of England</i> (2d ed. 1890) .....	30
van den Haag, <i>Punishing Criminals</i> (1975) .....	30
<i>Periodicals</i>	
Ehrhardt and Levinson, Florida's Legislative Response to <i>Furman</i> : An Exercise in Futility? 64 <i>J. Crim. L. &amp;</i> <i>Criminology</i> 10 (1973) .....	38, 39
Foley, Florida After the <i>Furman</i> Decision: Discretion in the Imposition of the Death Penalty (unpublished paper at the University of North Florida) .....	31
Gardner, The Renaissance of Retribution — An Exami- nation of Doing Justice, 1976 <i>Wisc. L. Rev.</i> 781 ..	30
Gillers, Deciding Who Dies, 129 <i>U. Pa. L. Rev.</i> 1 (1983) .....	<i>passim</i>
Greenwalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of <i>Powell v. Texas</i> , 69 <i>Colum. L. Rev.</i> 927 (1969) .....	30
Hart, The Aims of the Criminal Law, 23 <i>L. &amp; Contemp.</i> <i>Soc. Prob.</i> 401 (1958) .....	30
Hoffman and Meierhofer, Application of Guidelines of Sentencing, 3 <i>L. &amp; Psych. Rev.</i> 53 (1977) .....	42
LaFont, Assessment of Punishment — A Judge or Jury Function, 38 <i>Tex. L. Rev.</i> 834 (1960) .....	37
Liebman and Shepard, Guiding Capital Sentencing Dis- cretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor, 66 <i>Geo. L. J.</i> 757 (1978) ..	36
Manneheim, The Capital Punishment Cases: A Criticism of Judicial Method, 12 <i>Loy. L. Rev.</i> 85 (1978) ....	36
Marcus, <i>Allen Instruction in Criminal Cases: Is the Dyna- mite Charge About to be Defused?</i> 43 <i>Mo. L. Rev.</i> 313 (1978) .....	14



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Post- <i>Furman</i> Death Sentences in Florida (unpublished compilation prepared by Capital Punishment Project, Department of Sociology, Michael Radelet, Director, University of Florida) .....	31
New York District Attorney's Association, Memorandum and Draft Bill (October 17, 1960) .....	25
Powell, Jury Trial of Crimes, 23 Wash. and Lee L. Rev. 1 (1966) .....	27
Radelet and Vandiver, The Florida Supreme Court and Death Penalty Appeals, 74 J. Crim. L. and Criminology 401 (1983) .....	31, 38
Shipiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas, and Louisiana, 24 Loy. L. Rev. 709 (1978) .....	37
Symposium on Capital Punishment, 7 N.Y.L. Forum 249 (1961) .....	37
Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50 (1964) .....	25, 37
Wollan, The Death Penalty After <i>Furman</i> , 1974 Crim. J. Sys. Rev. 213 .....	37
Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33 (1972) .	37
Note, Florida's Legislative and Judicial Responses To <i>Furman v. Georgia</i> : An Analysis and Criticism, 2 Fla. St. L. Rev. 108 (1974) .....	38
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Annotation, 44 A.L.R. Fed. 468 (1979) .....	14

## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The initial opinion of the Florida Supreme Court on direct appeal affirming petitioner's conviction, but remanding his death sentence in light of *Gardner v. Florida*, 430 U.S. 349 (1977), is reported in *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981), *cert. denied*, 454 U.S. 1037 (1981) and is set out in the Joint Appendix at pages 18-23. The opinion of the Supreme Court of Florida affirming the reimposition of the death sentence is reported at 433 So.2d 508 (Fla. 1983) and is set out at pages 45-51 of the Joint Appendix.

### JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below and asserting herein a deprivation of rights secured by the Constitution of the United States. The judgment of the Supreme Court of Florida was entered on May 26, 1983. A timely motion for rehearing was denied by that court on July 13, 1983. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file a petition for writ of certiorari to and including October 11, 1983. Certiorari was granted on January 9, 1984. — U.S. —, 104 S.Ct. 697 (1984).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States which are set out in Appendix A hereto. This case also involves the following provisions of the statutes and rules of the State of Florida, which are set forth at Appendix A: Fla. Stat. §§ 782.04, 921.141, 932.465, and Fla. R. Crim. Proc. 3.490.

### STATEMENT OF THE CASE

On August 21, 1973, the decomposing corpse of a young woman was discovered in a garbage dump in Seminole County, Florida (T 213)<sup>1</sup>. The deceased was identified, by dental records, as Laura Harberts, last seen alive on August 5, 1973.

Joseph Spaziano was indicted by a Seminole County grand jury for the first degree murder of Ms. Harberts on September 12, 1975 (JA 2-3). The state's chief witness was an acquaintance of Mr. Spaziano named Anthony Dilisio, who was sixteen years old at the time of the events in question. He testified that he accompanied petitioner to a dump, for the ostensible reason, according to Dilisio, that petitioner could show him some of the women that he had raped and tortured (T 626-627). Dilisio testified that he saw two female bodies situated in the dump (T 631). He did not report what he had seen to the police (T 689).

The state's case rested exclusively upon the testimony of Dilisio, whose credibility was sharply contested at trial. Petitioner argued that Dilisio was unworthy of belief for several reasons. First, Dilisio had a motive to lie (R 49-50). Second, according to his father, Dilisio had a tendency to exaggerate the truth, although not to the point of being an "extreme" pathological liar (R 182). Third, Dilisio was an admitted drug user before, during and after the alleged incident at the dump. (T 655-657). Fourth, he never testified about the alleged incident at the dump until after he went to a police hypnotist (R 80). Further, Dilisio gave several inconsistent statements

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<sup>1</sup> In the brief, the symbol "JA" will be used to designate references to the Joint Appendix. As to the portions of the record not included in the Joint Appendix, the following symbols will be used:

- "T" . . . . . The trial transcript;
- "TS" . . . . . The transcript of the original sentencing trial;
- "R" . . . . . The record on appeal in the direct appeal;
- "RS" . . . . . The record on appeal in the resentencing proceedings.

regarding the location of the bodies he allegedly saw and the route taken to arrive there.

Aside from Dilisio the evidence consisted of testimony of two of the deceased's friends and two individuals who had known Mr. Spaziano. The state attempted to prove through the testimony of Beverly Fink and Jack Mallen, the deceased's roommate and the roommate's boyfriend, that Mr. Spaziano knew the deceased prior to her death. Both witnesses testified that an individual they identified as Mr. Spaziano came to the door of the apartment sometime in July and asked to see the deceased (T 401-402, 467-468). However, they identified that individual, who said he was a traveling cook, to be Mr. Spaziano from an arguably suggestive photographic lineup, *see* State's Exhibit 7. Ms. Fink also testified that the deceased was dating several individuals, one of whom was name "Joe", but none of whom was Mr. Spaziano (T 408-409, 410, 411, 437). In addition, William Coppick and Mike Ellis testified that approximately two years prior to the alleged incident, Mr. Spaziano lived in a trailer in the same general area where the deceased's body was found. Mr. Coppick also testified that Mr. Spaziano told him about finding some bones, but never said where or exactly when the alleged conversation took place (T 563, 572). Mr. Ellis further stated that Mr. Spaziano took him to the general area where the body had been found and he concluded that Mr. Spaziano went to get some marijuana "stashed" there (T 599-600, 602-603). Again, Mr. Ellis was unsure of the date when this took place. The medical examiner testified that he conducted an autopsy the morning after the body was discovered (T 292) and found no evidence of trauma (T 294) and could not give an opinion as to the cause of death (T 298).

After the submission of evidence, outside the presence of the jury, the trial judge presented petitioner with the choice of waiving the statute of limitations which had run as to all lesser included noncapital offenses or having the jury instructed only as to first-degree murder. Petitioner chose the latter with the result that the jury was not permitted to consider verdicts of

guilt of lesser included, noncapital offenses (T 751-755). The jury, after deliberating more than five hours and after being given a "jury deadlocked" charge, returned a verdict of guilty of first-degree murder (T 808-820). The same jury recommended that petitioner be sentenced to life imprisonment (TS 28), but the advisory verdict was overridden by the trial judge who sentenced petitioner to death (JA 13). Thereafter, petitioner appealed his conviction and sentence to the Florida Supreme Court, which affirmed the conviction but reversed the death sentence for a violation of *Gardner v. Florida*, 430 U.S. 349 (1977), and remanded for a hearing before the trial judge. *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981). In that direct appeal petitioner specifically raised the issue regarding the constitutionality of his death sentence under *Beck v. Alabama*, 447 U.S. 625 (1980) where the jury had been precluded from considering petitioner's guilt of an offense less than capital homicide. The Supreme Court of Florida squarely reached the federal question in its opinion on direct appeal and ruled that there had been no constitutional violation (JA 22). The federal question was further pursued by petitioner in his motion for rehearing. The court denied rehearing, though the two dissenting justices wanted to consider the question further (JA 24). Petitioner also challenged the constitutional propriety of the imposition of the death sentence over the jury's life verdict, but because of the court's disposition—the *Gardner* remand of the sentence—these questions were not reached.

A *Gardner* resentencing hearing was held on May 8, 1981 in the trial court before the judge only, in accord with the Florida Supreme Court's limited remand. Despite the earlier jury verdict of life, petitioner was again sentenced to death (JA 29).

Petitioner appealed his death sentence to the Florida Supreme Court, which affirmed. *Spaziano v. State*, 433 So.2d 508 (1983). In his appeal, petitioner again challenged the propriety of overriding the jury's life verdict. He contended that the override in his case violated the Eighth and Fourteenth Amendments and that it is constitutionally impermissible in all cases to override the jury's verdict for life. The Florida Su-

preme Court ruled directly upon the federal question, relying upon its previous decision in *Douglas v. State*, 373 So.2d 895 (Fla. 1979) where it upheld the constitutionality of the override under the Fifth, Sixth, Eighth and Fourteenth Amendments, and again found no constitutional violation in the procedure (JA 48-49). Further, the court affirmed petitioner's death sentence: "We find the facts suggesting that the death sentence be imposed over the jury's recommendation of life, . . . meets the clear and convincing test to allow the override of the jury's recommendation in accordance with previous decisions of this Court." (JA 48). The question was again presented to the court by motion for rehearing requesting the court to reconsider its previous decisions holding that the jury override did not violate the Fifth, Sixth, Eighth and Fourteenth Amendments. The court denied rehearing (JA 52).

Petitioner timely filed in this Court his petition for a writ of certiorari which was granted on January 9, 1984 (JA 53).

#### SUMMARY OF ARGUMENT

1. This case is before the Court in precisely the same legal and factual posture as was *Beck v. Alabama*, 447 U.S. 625 (1980). Mr. Spaziano's jury, just as Mr. Beck's jury, was precluded by operation of law from considering any offenses less than capital homicide, though there was a reasonable basis in the evidence to support such lesser included offenses. *Beck* found such a situation to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 643. The dangers identified in *Beck* came to pass in this case. The jury, faced with an impossible two-option dilemma, had great difficulty reaching a verdict, doing so only after an *Allen* charge. This situation posed as great a threat to reliability as did the situation in *Beck*. More than in *Beck* the record shows that the evil it predicted actually occurred in this case. The jury issued an almost immediate life sentencing verdict under circumstances indicating that it was using that verdict as a safeguard against the result of its two-option dilemma. Accordingly, *Beck* controls this case and



mandates that Mr. Spaziano's death sentence be vacated. The fact that the source of the unreliability was a statute of limitations rather than an "express statutory provision" as characterized by the court below, does not make Mr. Spaziano's case more reliable or more constitutionally tolerable.

2. Whether analyzed under the Eighth Amendment, the Sixth Amendment or the Due Process Clause, Florida's jury override violates the Constitution. First, the objective indicia such as historical usage and legislative enactments compel two conclusions: (1) that juries, not judges, are best equipped to make reliable death decisions and (2) that a jury's decision for life is inviolate.

Second, the Court's independent judicial judgment should confirm the nearly universal legislative rejection of the jury override in capital cases. Death is different, in part, because it is a uniquely retributive punishment. Since the death penalty is society's expression of outrage at offensive conduct, the jury not the judge, is more likely to reliably place the offense and the offender on society's yardstick of moral outrage. Further, petitioner will demonstrate that the countervailing considerations are insufficient to justify the override procedure. Florida's override is based on no judgment, legislature or judicial, that such a procedure serves an important state interest; the override is rather a misguided attempt to comply with *Furman*. In addition, jury nullification, i.e., the jury's exercise of its power to bring in a verdict of acquittal in the teeth of both law and facts, is not a factor. By expressing its judgment to spare the life of a particular accused, the jury is not nullifying the law; it is performing precisely the function for which it was empaneled. Finally, while judges may bring a variety of professional skills to noncapital sentencing, those skills cannot substitute for a jury sitting as the "peers" of the accused. To the extent that the death decision is a decision whether to be retributive, it is the jury, not the judge, that has the "expertise." To the extent that the death decision involves findings of fact, *Bullington v. Missouri*, 451 U.S. 430 (1981) mandates that the jury's findings cannot be overridden.



3. The Florida standards governing the override of a jury's life verdict were, in this case, applied in a manner that denigrated the jury's consideration of mitigating factors and that was so vague and broad as to violate the constitutional requirement of reliability in death determinations. Petitioner's death sentence was the result of pincer-like constraints on the jury's ability to exercise its decision-making power in a rational and reasonable manner. On the one hand, the jury was deprived of the ability accurately to gauge the weight of the evidence against petitioner because of the failure to give the lesser included offenses. On the other hand, the jury's apparent attempt to proportion its verdict to petitioner's culpability at the sentencing phase was overridden by the judge.

Florida law holds that a jury's verdict for life cannot be overturned unless no reasonable basis exists for the verdict. But that standard was not applied here, because there was a reasonable basis for the jury's life verdict: the weakness of the evidence regarding petitioner's culpability. Reasonable people could and did disagree over the fate of Joseph Spaziano.

## ARGUMENT

### I

#### **A DEATH SENTENCE IMPOSED AFTER A JURY VERDICT OF GUILT OF A CAPITAL OFFENSE, WHEN THE JURY WAS NOT PERMITTED TO CONSIDER A VERDICT OF GUILT OF LESSER INCLUDED OFFENSES THOUGH THE EVIDENCE WOULD HAVE SUPPORTED SUCH A VERDICT, VIOLATES THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE.**

This case is before the Court in precisely the same factual and legal posture as was *Beck v. Alabama*, 447 U.S. 625 (1980). Mr. Spaziano's jury, just as Mr. Beck's jury, was precluded by operation of law from considering any offenses less than capital homicide, though there was a reasonable basis in the evidence to support such lesser-included offenses. The lack of this "third option" was found in *Beck* to "introduce a level of uncertainty and unreliability into the factfinding process that cannot be

tolerated in a capital case." *Id.* at 643. Those dangers identified in *Beck* plainly came to pass in this case. We will demonstrate that *Beck* controls to require Mr. Spaziano's death sentence be vacated, and that the state's statute of limitations does not excuse or make more constitutionally tolerable the uncertainty and unreliability interjected into Mr. Spaziano's trial.

#### A. Beck Requires Reversal Of Mr. Spaziano's Death Sentence

The offense in this case was alleged to have occurred between August 4 and August 22, 1973 (R 27). Two years and some three weeks later, an indictment was sought and returned, on September 12, 1975, charging Mr. Spaziano with first degree murder (JA 2-3). The three weeks beyond two years is important because the statute of limitations for noncapital offenses in Florida was two years and there was no limitation on capital offenses. § 932.465, *Fla. Stat.* (1973). Three weeks may seem to be a short period of time, but it made a great difference in Mr. Spaziano's trial. The timing of the indictment posed the question of jurisdiction on the lesser-included offenses of first degree murder. At the close of the evidence, Mr. Spaziano was given the choice of either waiving the applicable statute of limitations with respect to the lesser included noncapital offenses (attempted first degree murder, second degree murder, third degree murder and manslaughter)<sup>2</sup> or having the jury instructed only as to first degree murder (T 751-755). Mr. Spaziano declined the offer to

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<sup>2</sup> Florida law is settled that the trial court must instruct the jury on all lesser included offenses. *E.g. Brown v. State*, 206 So.2d 377, 381 (Fla. 1968). In fact at the time of Mr. Spaziano's trial this requirement applied even if there was no evidence to support the lesser offenses. *Id.* That rule was changed effective October 1, 1981 to require instructions on lesser offenses only when supported by the evidence. *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla. 1981).

waive the statute of limitations.<sup>3</sup> As a result, the jury was given only two options—guilty of first degree murder or acquittal.<sup>4</sup> The jury had a great deal of difficulty with these two options. Deliberations lasted more than six hours (T 808-820), were interrupted by judicial inquiry,<sup>5</sup> and were reported as deadlocked. The jury was then given the "Allen charge"<sup>6</sup> and only minutes later returned the verdict of guilt (T 820).

In *Beck*, the Court held that "the death penalty may not be imposed" where the jury is not permitted to consider a verdict of guilt of a lesser included non-capital offense where the evidence would support such a verdict. 447 U.S. at 627. The Court's holding applies equally to Mr. Spaziano's case. Draw-

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<sup>3</sup> In fact, there was a question at the time of Mr. Spaziano's trial whether a waiver of the statute of limitations would even be effective. *E.g. Tucker v. State*, 417 So.2d 1006, 1011 (Fla. 3d DCA 1982) ("[T]he issue of whether a defendant may waive the statute of limitations for purposes of conviction appears never to have been directly addressed in Florida, . . ."). The question arises because Florida considers the limitations to be a "jurisdictional" bar, and hence need not be pleaded in the trial court by the defendant and can be raised at any time. *E.g. Mead v. State*, 101 So.2d 373 (Fla. 1958); *State v. King*, 282 So.2d 162 (Fla. 1973); *Tucker v. State*, 417 So.2d at 1012; *id.* at 1014 (Pearson, J., concurring specially).

<sup>4</sup> As the jury was instructed: "There are only two verdict alternatives in this case. The alternatives are, not guilty, or, in the alternative, guilty of murder in the first degree as set out in the indictment." (T 805-806).

<sup>5</sup> As the hour grew late, the court inquired of the foreman: "if given more time is there a reasonable probability that the jury could agree on a verdict, it being the jury's function to do so." (T 815) About two hours later, the court called the jury out to inquire again whether it would be able to reach a verdict (T 817). The foreman replied: "At this point, Your Honor, I don't believe so." (T 817). The judge then gave the "jury deadlock" or "Allen" charge to the jury over defense objection.

<sup>6</sup> *Allen v. United States*, 164 U.S. 492 (1896).

ing upon its reasoning in *Keeble v. United States*, 412 U.S. 205 (1973), the Court reaffirmed the principle that "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the full benefit of the reasonable-doubt standard." 447 U.S. at 635. This is so for while a jury should, "as a theoretical matter," return a verdict of acquittal where the prosecution has not established every element of the offense charged, the lack of lesser-included offense instructions creates the "substantial risk that the jury's practice will diverge from theory." 447 U.S. at 635 (quoting *Keeble*, 412 U.S. at 212). Theory diverges from practice because

where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

*Id.* Thus, *Keeble* held that an instruction on the lesser included offense was a critical procedural right that could not be denied to a federal criminal defendant. And *Beck* extended the *Keeble* reasoning to a state capital case and found that the lack of the "third option" so threatened the accuracy of the factfinding process that it could not be tolerated under the Constitution. The "procedural safeguard" of the instruction on lesser included offenses is especially important in a capital case for "death is a different kind of punishment", *Gardner v. Florida*, 430 U.S. 349, 357 (1977), and entails a "corresponding difference in the need for reliability." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Echoing the reasoning of *Keeble*, *Beck* found the lesser included option to be a constitutional imperative in a capital case:

[w]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify a conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser in-

cluded offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

*Beck*, 447 U.S. at 637.

"In the final analysis" precluding a jury's consideration of the third option "interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." These irrelevant considerations "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 642-643.

The risk of an unwarranted conviction of a capital offense came to pass in the present case in a manner that falls squarely within the four corners of *Beck*. Mr. Spaziano's jury, like Mr. Beck's, was faced with the predicament of having but two options in its guilt determination. That this predicament actually interjected itself into the jury's deliberation is shown by the difficulty the jury had in reaching a verdict, a verdict returned only after the "dynamite charge." Mr. Spaziano's jury was faced with what it was told was a very brutal offense, but with only flimsy evidence to support guilt of the capital offense. There was no direct evidence of the offense, no evidence as to the cause of death, the manner and means of death, or a motive for the death. In short, there was virtually no evidence as to the degree of homicide.

The state case rested exclusively<sup>7</sup> upon the testimony of 16-year-old Tony Dilisio, who had no personal knowledge of the

<sup>7</sup> As the prosecutor told the trial court during a motion to preclude Dilisio's testimony: "If we can't get in the testimony of Tony Dilisio, we'd absolutely have no case here whatsoever. . . . So either we're going to have it through Tony, or we're not going to have it at all." (T 614)

offense itself and related only what Mr. Spaziano purportedly told him and showed him at the scene weeks later, though he said he had never believed Mr. Spaziano (T 627-628). Moreover, Dilisio's credibility was placed in substantial doubt by a number of factors, including his motives to testify falsely, his tendency to "exaggerate" the truth, his admitted extensive drug use during relevant times, and the fact that he did not report what he had supposedly seen and only "recalled" the subject of his testimony after undergoing police hypnosis. Accordingly, there was *no* direct evidence of a premeditated homicide<sup>8</sup>—if, how, when, why it might have occurred—leaving just the indirect supposition evidence that was itself subject to considerable question.

Since there was no evidence as to the manner, means or motive of the death, there could certainly be a question of whether the state had met its burden of proving the intent required for the capital offense. For example, even taking the state's evidence at face value, the jury could have believed that the state had shown that Mr. Spaziano was somehow involved in or knew about the homicide and was thus culpable in that offense, but not believed that the state had met its burden of proving the essential element of premeditation.<sup>9</sup> This element could be in further doubt if the jury rejected even part of Dilisio's story. With evidence on the essential element of

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<sup>8</sup> Though in Florida a charge of first degree murder includes both premeditated and felony murder, *Knight v. State*, 338 So.2d 201 (Fla. 1976), Mr. Spaziano's jury was instructed only on the theory of premeditation (T 794-96).

<sup>9</sup> Evidence of premeditation cannot be left to "guesswork and speculation." *Weaver v. State*, 220 So.2d 53, 59 (Fla. 2d DCA 1969). "[I]n order to constitute murder in the first degree it must be established beyond every reasonable doubt, not only that the accused committed an act which resulted in the death of another human being, but it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being



premeditation so lacking, a verdict of second degree murder ["evincing a depraved mind regardless of human life," § 782.04 (2), *Fla. Stat.* (1973)] would certainly have been reasonable. See, e.g., *Hall v. State*, 403 So.2d 1319 (Fla. 1981) (evidence showing that the defendant was involved in the killing, but not showing how the killing was actually accomplished, was insufficient to establish premeditation, but did support second degree murder.)<sup>10</sup> The evidence certainly could have supported a conviction for a lesser included offense. But the jury was not given that option.

More than in *Beck*, therefore, this case presents solid indications that the evil predicted by *Beck* actually occurred here. Mr. Spaziano's jury had obvious difficulty reaching a verdict. Its deliberations were interrupted several times by judicial inquiry—one time the judge reminded the jury that it was its "function to return a verdict" (T 815).<sup>11</sup> As the deliberations drew on, the judge called the jury out to ask whether it would be able to reach a verdict (the jury had not at that point reported a deadlock). The foreman said: "At this point, I don't

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and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being, and if then in the execution of such purpose and design he kills another, his act is murder in the first degree." *Snipes v. State*, 154 Fla. 262, 17 So.2d 93, 97 (1944).

<sup>10</sup> It is also reasonable that a verdict of manslaughter could be returned under the residual aspect of that offense which is defined as: "The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, . . ." (emphasis supplied) *Fla.Stat.* § 782.07 (1973); cf., *Snipes v. State*, *supra* (where the court found insufficient evidence of premeditation and reduced the verdict to manslaughter, though it eventually decided to order a new trial because of "prejudice.").

<sup>11</sup> See *Jenkins v. United States*, 380 U.S. 445 (1965) (Finding coercive a judge's statement to the jury that "You have got to reach a decision in this case.")



believe so." (T 817). The judge responded by giving (over objection) the "Allen" or "dynamite" charge. Having been "dynamited," the jury returned a verdict within minutes (T 820).

The reliability of the guilt determination was plainly threatened further by the *Allen* charge. The jury was given only two options and was having great difficulty with its impossible dilemma. Poised in this impossible situation, however, the jury was then further pressured by the "Allen" charge.<sup>12</sup> "While it is, of course, impossible to gauge what part [the *Allen* charge] played in the jury's action of returning a verdict" within minutes after the charge, "this swift resolution of the issues in the face of positive indications of hopeless deadlock, at the very least give rise to serious questions in this regard." *United States v. United States Gypsum Co.*, 438 U.S. 422, 462 (1978). There can be little doubt in this case of the "substantial risk that the jury's practice . . . diverge[d] from theory." *Keeble*, 412 U.S. at 212.

That risk is made even more evident by the jury's sentencing verdict. In contrast to the difficulty the jury had in reaching its guilty verdict, it reached an almost immediate sentencing verdict of life imprisonment. This verdict suggests strongly that the jury was attempting to use the life verdict as its only available safeguard against the overall weakness of the evidence. If it had believed the state's evidence, the jury would

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<sup>12</sup> The "Allen charge", though approved by the Court, has itself been subject to considerable criticism as threatening the reliability and independence of the jury's verdict. See, e.g., *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972), *aff'd en banc*, 480 F.2d 518 (5th Cir. 1973); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969). Because of the threats to reliability posed by the "Allen charge" the modern trend is away from its use. See generally Annot., 97 A.L.R. 3d 96 (1980); Annot., 44 A.L.R. Fed. 468 (1979); Marcus, *Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?* 43 Mo.L.Rev. 613 (1978); ABA Standards Relating to Trial by Jury, § 5.4 (1968).

have believed that Mr. Spaziano had committed a brutal crime.<sup>13</sup> The life verdict thus suggests strongly that the jury was concerned over the result of its two-option dilemma, and sought a "third option" through its sentencing verdict.

Accordingly, the record plainly shows that the threats to the reliability of the guilt determination were real. As determined by *Beck*, "the death penalty may not be imposed under these circumstances."

**B. The Intolerable Uncertainty And Unreliability Is Not Excused By The Statute Of Limitations**

As discussed in the preceeding section, the record reveals a constitutionally impermissible risk of an unwarranted conviction through the withholding from the jury of the third option of convicting Mr. Spaziano of a lesser included offense. The Supreme Court of Florida, however, sought to excuse that unconstitutionality and distinguish *Beck*, reasoning that rather than an "express statutory prohibition" as in *Beck*, the preclusion of the third option in this case arose from a separate statute of limitations. This difference, the Florida court believed, rendered constitutional his otherwise unconstitutional death sentence. (JA 22)

The Florida Supreme Court's attempted distinction of *Beck* must fail because the results are identical: here as in *Beck* there are serious risks of unreliability. Under the Florida court's reasoning, Mr. Spaziano could have had a constitutionally fair trial—without the intolerable risk of unreliability—if only the

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<sup>13</sup> As the Florida Supreme Court observed in reviewing a pre-*Furman* capital case where the jury had recommended mercy: "The deceased was killed by some assassin in cold blood, and if this defendant was in fact guilty of it there were no circumstances that called for or justified an extension of mercy, unless it was incorporated into the verdict as a safeguard against the prickings of the jurors' consciences. . . ." *Nims v. State*, 70 Fla. 530, 70 So. 565, 566 (1915); accord *Davis v. State*, 90 So.2d 629, 632 (Fla. 1956).

state had filed the indictment one month earlier. Since, however, the state filed the indictment three weeks after the statute of limitations had run as to the lesser offenses, the resulting two-option unreliability became tolerable. Such reasoning is unsatisfactory. The harm found in *Beck* is the harm of a distorted factfinding process at a time when the defendant's life is at stake. The factfinding does not become less distorted simply because the source of the denial of the third option is different.

The State of Florida certainly has an interest in administering its own statute of limitations. It is, however, purely a state policy decision which the State is free to change as it wishes. In fact the statute of limitations has now been amended in a manner that if applicable to Mr. Spaziano's case would not bar the lesser offenses.<sup>14</sup> Nevertheless, at the time of Mr. Spaziano's trial the State had chosen a two-year limitations period for all noncapital offenses. It had thus chosen, as state policy, that prosecution of all second degree murders, third degree murders, or manslaughters was barred if not undertaken within two years. Thus, if Mr. Spaziano were to receive a new trial with a jury properly instructed upon the lesser included offenses and the jury returned a verdict for a lesser offense, a legal determination by the judge that the statute of limitations barred adjudication would result not from *Beck*, but from the State's own policy choice. Mr. Spaziano would simply receive the benefit given by the statute of limitations to all others

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<sup>14</sup> Section 932.465, Florida Statutes (1973) was substantially amended and renumbered as *Fla. Stat.* § 775.15 (Supp. 1974), effective October 1, 1975. As amended there is no limitation on capital and life felonies, a four-year limitation on first degree felonies, and three years for all other felonies. Thus, if it had been applicable to Mr. Spaziano's trial, the statute would not have barred the lesser included offenses. It was, however, inapplicable because under Florida law it is the statute of limitations in effect at the time of offense that governs. *E.g. State ex rel Mauncy v. Wadsworth*, 293 So.2d 345 (Fla. 1974).

guilty of a like offense. As the Florida Supreme Court held, in a somewhat different context,<sup>15</sup> with regard to the statute of limitations:

A jury has said this man is not guilty of murder in the first degree and, therefore, he is entitled to every benefit to which any one else can be entitled who is also only guilty of murder in the second degree. . . . [The State cannot] deprive him of the benefit of the statute of limitations while others guilty of the like offense may have the benefit of the statute of limitations. . . .

*Mitchell v. State*, 157 Fla. 121, 25 So.2d 73, 75 (1946). This reasoning also answers the question, should it be posed, as to why the defendant should not be forced to waive the statute of limitations in order to receive a fair trial in accord with *Beck*. As can be seen from *Mitchell*, that statute of limitations is considered a "substantive right" in Florida. See also *Lane v. State*, 337 So.2d 976 (Fla. 1976); *State v. King*, 282 So.2d 162 (Fla. 1973). And, a defendant cannot be required to waive a substantive right in order to receive a constitutionally fair trial. Thus, because a court may not have jurisdiction to adjudicate a defendant guilty of the lesser included offense is not of constitutional import. In fact, the Court's decision in *Keeble* did not depend upon whether the trial court had jurisdiction to adjudicate and sentence on the lesser offense. The question of jurisdiction on that lesser offense was not decided in *Keeble* and thus was not a part of its holding. See *United States v. John*, 437 U.S. 634, 636 n. 3 (1978); *Felicia v. United States*, 495 F.2d 353 (8th Cir. 1974).

The question as to whether a trial court may adjudicate a defendant convicted of a lesser included offense, is a separate legal decision that just be made by the trial court applying a

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<sup>15</sup> The Florida legislature had passed an amendment to the statute of limitations that excepted lesser included offenses from the limitations bar when a capital offense was charged. The Florida Supreme Court struck that statute as violative of equal protection on the reasoning quoted in the text.

separate analysis of state law. A number of legal questions can arise in applying a statute of limitations which are quite apart from the determination of the offense.<sup>16</sup> These decisions must be made by the judge and a judge cannot avoid those decisions simply by preventing a verdict from being rendered on a lesser included offense. As expressed in dissent by Justice Boyd in *Holloway v. State*, 379 So.2d 953 (Fla. 1980):

The accused has a right to have the jury instructed on all less serious included offenses regardless of the expiration of the limitations period on the lesser offenses. The purpose of these instructions is to guide the jury in reaching the proper verdict and the running of the statute of limitations should have no effect.

The function of the jury, in reaching the proper verdict, is to make factual and not legal determinations. If the jury finds that the conduct of the accused fits under a certain category of crime, it so informs the court in its verdict. The judge then decides the legal question of whether upon the verdict rendered an adjudication of guilt is proper. If the verdict finds the accused guilty of an offense barred by the statute of limitations, the court should acquit the defendant.

*Id.* at 954 (Boyd, J., dissenting from the dismissal of certiorari). These observations were echoed by Justice Blackmun in dissent from denial of certiorari in *Holloway*: "Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate legal matter with which the factfinder need have no concern." *Holloway v. Florida*, 449 U.S. 905, 908 (1980) (Blackmun, J., dissenting). See also *Spaziano v. Florida*, 454 U.S. —, —, 102 S.Ct. 581 (1981) (Marshall, J., dissenting).

<sup>16</sup> For example, it must be determined whether the statute of limitations was tolled by some state action, *State v. Hickman*, 189 So.2d 254 (Fla. 2d DCA 1966), when the statute began to run in the case, *State v. King*, *supra*, the sufficiency of the allegations in the indictment, *Mitchell v. State*, 101 So.2d 373 (Fla. 1958), and the sufficiency of the evidence to show commission within the limitations period, *Ball v. State*, 204 So.2d 523 (Fla. 3d DCA 1967).

Moreover, establishing a different rule for a statute of limitations bar than for an express statutory bar, would create a painfully obvious opportunity for prosecutorial abuse. The mandate of *Beck* could be avoided by simply waiting to file an indictment until after the limitations period had run, thereby "mak[ing] it easier to convict" the defendant, *Keeble*, 412 U.S. at 212. It would permit a prosecutor to determine whether a defendant would receive a constitutionally reliable trial, simply by the timing of the filing of an indictment. Surely such a result cannot be logically defended.

Rather, a defendant charged with first degree murder should be entitled to a constitutionally reliable factfinding regardless of whether the statute of limitations has run as to the lesser included offense. A jury instructed on lesser included offenses that returns a verdict for such an offense would be doing precisely what a jury is supposed to do, determining if and what offense has been proven by State. A judge who determines later that adjudication is barred by the statute of limitations would be doing precisely what he should do, resolving legal questions. And if adjudication is barred, the defendant would receive precisely what was intended by the state in its statute of limitations. In short, the system would function precisely as it should. Such a procedure accommodates the interest of the defendant and society in assuring that the factfinding is accurate, and enforces the state policy with regard to its statute of limitations.

Accordingly, the record in this case stands as stark witness to the evil-come-true of *Beck*. The lower court decision must be reversed.



## II

**A TRIAL JUDGE'S OVERRIDE OF A JURY'S FACTUALLY  
BASED DECISION AGAINST THE DEATH PENALTY  
MUST, IN ALL CASES, VIOLATE THE FIFTH, SIXTH,  
EIGHTH AND FOURTEENTH AMENDMENTS**

**A. The Jury Override Should Be Measured By The Evolving  
Standards Concerning The Imposition Of The Death  
Penalty**

This case presents a narrow issue. The constitutionality of Florida's overall death penalty system is not in dispute here; relatively few death sentences in Florida or elsewhere are imposed as a result of an override of a jury life verdict.<sup>17</sup> Petitioner will demonstrate that, if a jury takes part in capital sentencing at all, its life verdict must be binding. To do so, we will discuss the reasons for involving a jury in the capital sentencing decision. Regardless of whether jury sentencing is required for capital sentencing, the question of jury in-violability is closely interwoven with the question of jury sen-tencing; many of the reasons for requiring a jury sentence in capital cases also counsel that a jury's verdict for life must be final.

Petitioner acknowledges that the Court has suggested that the power of a Florida judge to override a jury's life recommen-dation is constitutional. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976); *Dobbert v. Florida*, 432 U.S. 282, 294-96 (1980); *Barclay v. Florida*, \_\_\_\_ U.S. \_\_\_\_, 103 S.Ct. 3418 (1983); *id.* at 3426-27 (Stevens and Powell, J.J., concurring). But the issue was not presented or briefed in any of those cases<sup>18</sup> and the

<sup>17</sup> See notes 24, 25, and 26, and accompanying text, *infra*.

<sup>18</sup> In none of these cases was the constitutionality of the override procedure at issue. In *Proffitt*, both judge and jury recommended death, 428 U.S. at 246; the sole issue was whether the imposition of death in any case under the Florida statute violated the Constitution. *Id.* at 245; see *Gregg v. Georgia*, 428 U.S. 153, 202 n. 51 (1976) (noting the "limited grant of certiorari" in the five 1976 cases). In *Dobbert*,



Court's observations on the issue "though weighty and respectable, are nevertheless, dicta." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). As made clear in *Duncan, Williams v. Florida*, 399 U.S. 78, 91, 93 (1970), and *Ballew v. Georgia*, 435 U.S. 223, 231 (1978) when the scope of the right to a jury is concerned dicta will not do.<sup>19</sup>

The Court's death penalty jurisprudence has developed in a dynamic manner because of the "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). In evaluating the constitutionality of a procedure for imposing the death penalty, the Court applies a two-part test derived from the proposition that the "[eighth] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). First, the Court looks to contemporary values and public attitudes as manifested by objective indicia such as historical usage and legislative enact-

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the grant of certiorari was also limited and did not include this issue, 432 U.S. at 284; the Court held only that, given the presumed protections of *Tedder*, "defendants are not significantly disadvantaged vis-a-vis . . . the old statute" for purposes of the ex post facto clause. 432 U.S. at 296. In reaching the issue of the judge's consideration of nonstatutory factors in *Barclay*, the Court presumed but did not discuss the constitutionality of the override procedure. — U.S. at —, 103 S.Ct. at 3420.

<sup>19</sup> It is settled that the Court does not resolve issues not raised on certiorari. *Mazer v. Stein*, 347 U.S. 201, 208 n.6 (1954). This rule applies with special force in the context of the jury issue. "Perhaps because the right to jury trial was not directly at stake, the Court's remarks . . . took no note of past or current developments regarding jury trials, did not consider its purposes and functions, [and] attempted no inquiry into how well it was performing its job . . ." *Duncan*, 391 U.S. at 155; accord *Ballew*, 435 U.S. at 231; *Williams*, 399 U.S. at 91, 93.

ments. Second, it makes an independent judicial assessment of the constitutionality of the practice in question. A challenged procedure must pass both parts of the Eighth Amendment test to be constitutional. The Court has used this two-step analysis to evaluate the constitutionality of the death penalty itself, *Gregg v. Georgia*, *supra*; of capital punishment for rape, *Coker v. Georgia*, 433 U.S. 584 (1977); of the death penalty for those who only aid and abet murder, *Enmund v. Florida*, \_\_\_\_ U.S. \_\_\_\_, 102 S.Ct. 3368 (1982); of mandatory death penalties, *Woodson v. North Carolina*, 428 U.S. 280 (1976); and of capital laws excluding lesser included offense charges. *Beck v. Alabama*, *supra*.

This approach under the eighth amendment is remarkably similar to the analysis applied in *Duncan v. Louisiana*, in evaluating whether the sixth amendment right to jury trial should be made binding on the states. The Court in *Duncan* first examined the history and prevailing practice of trial by jury in criminal cases. 391 U.S. at 151-154. *See also Baldwin v. New York*, 399 U.S. 66, 70-72 (1970). After reviewing such objective indicia, the Court then considered the "purposes and functions" of trial by jury and evaluated "how well [the jury] was performing its job." 391 U.S. at 155.

In determining whether the jury override procedure is constitutionally permissible, then, the Court must consider how that procedure has functioned in the actual context of the modern capital sentencing system. For

it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose [capital] punishment without granting a jury trial appears quite different from the way it appeared in the older cases . . .

*Duncan*, 391 U.S. at 149 n. 14.

The required analyses under the Eighth Amendment, the Sixth Amendment, and the Due Process Clause coalesce in this case. As we show below, they indicate that a judge may not override a jury's life sentence.

**B. The Objective Indicia Are That Contemporary Values Hold A Jury's Life Sentence Inviolable**

The indicia of the nation's judgment concerning who should decide who dies include "history and traditional usage, legislative enactments, and jury determinations." *Woodson v. North Carolina*, 428 U.S. at 289. Together, they dramatically compel two conclusions: (1) that juries, not judges, are best equipped to make reliable death decisions and (2) that a jury's decision for life is inviolate.

Since the mid-nineteenth century, American legislatures have decided with near unanimity that no person should be sentenced to die without the consent of his peers. Prior to *Furman v. Georgia*, "except for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n. 11 (1971). The *Woodson* plurality traced this history:

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes.<sup>[20]</sup>

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<sup>20</sup> It is noteworthy that Tennessee instituted a binding life recommendation by the jury in 1838, made it nonbinding in 1858, and finally returned in 1919 to the original policy of finality which it maintains today (see Appendix C). See also *Gohlston v. State*, 43 Tenn. 126 (16 Thompson), 223 S. W. 839 (1920) (noting return to binding jury mercy power).

This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. . . . By 1973, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury sentencing.

428 U.S. at 291-92. See also *Lockett v. Ohio*, 438 U.S. 586, 598-99 (1978); Bowers, *Executions In America* 7-9 (1974).

Thus, the majority of legislatures have made juries rather than judges the sentencer in capital cases. A much larger majority has determined that, when there is a jury, its decision for life is final. Indeed, the practice of overriding a jury's verdict in favor of life is contrary to the overwhelming national practice at least since 1948. At no time since 1948 have more than three American jurisdictions authorized the rejection of a jury's determination for mercy in a capital case.

Out of 42 jurisdictions (including the United States) with discretionary capital punishment for murder in 1948,<sup>21</sup> only New York, Delaware and Utah sanctioned the practice of jury override. By the time of *Furman* in 1972, only Delaware and Utah out of 41 capital murder jurisdictions permitted jury overrides (including the United States and the District of Columbia);<sup>22</sup> New York made a mercy decision by either the judge or the jury binding in 1963.<sup>23</sup>

Prior to *Furman* death sentences after jury mercy recommendations were only rarely imposed or executed. There were

<sup>21</sup> See *Andres v. United States*, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertently, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 1939, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

<sup>22</sup> See *Witherspoon v. Illinois*, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. See Appendix C.

<sup>23</sup> See *People v. Fitzpatrick*, 308 N.Y.S.2d 18, 22 (1970).

no executions in Delaware after 1949. All seven Utah executions between 1948 and 1972 involved cases where the jury recommended death; in two other cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix D for Utah cases). Commentators have also observed that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964) (citing New York District Attorney's Association, *Memorandum and Draft Bill* (October 17, 1960)). Thus, at least since 1948, death sentences after jury decisions for life have been rare in legislative practice and rarer yet in application.

Of the 38 jurisdictions that have chosen to retain the death penalty since *Furman*, 30 require a penalty jury's consent for death. In five of the other states, the judge alone decides penalty. None of the jurisdictions that permitted the override of a jury life determination in 1948 have retained such a practice. New York ended it in 1963, and Utah and Delaware now provide for a life sentence unless all 12 jurors agree on death. In only three states does the jury make a non-binding recommendation: only Florida, Indiana and Alabama permit death sentences after jury decisions for life (see Appendix C). As of February 1984, only two death sentences after jury life determinations have been imposed under the Indiana statute, one of which has been affirmed.<sup>24</sup> Four have been imposed under the Alabama statute, but none have yet been affirmed.<sup>25</sup>

<sup>24</sup> The Indiana Supreme Court affirmed the jury override in *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983). The second case is currently awaiting briefing in that court, *Jay Thompson v. State*, Indiana Supreme Court No. 882-S303 (Harrison County No. 81-S62, sentenced on March 18, 1982).

<sup>25</sup> The case of *Murry v. State* was affirmed on March 29, 1983 by the Alabama Court of Criminal Appeals (3 Div. No. 604), but is pending decision in the Alabama Supreme Court (No. 82-743). That court requested further briefing after oral argument in *Murry* on the

With but one exception, therefore, all of the affirmances of death sentences imposed over a jury's life verdict since *Furman* have been in Florida.<sup>26</sup>

The Florida practice is itself an historical anomaly. The jury recommendation of mercy in a capital case was final from 1872 to 1972; as explained below, the present override procedure is the result of confusion over *Furman's* requirements and not of dissatisfaction with jury discretion for mercy.<sup>27</sup>

Over the past 30 years, there has been a consistent national judgment of near uniform scope that a jury determination of life in a capital case must be absolutely final. Twenty-one states now make life imprisonment automatic if even one juror fails to agree for death (see Appendix C); some of these states (e.g. Georgia, Louisiana, Virginia) specifically authorize the jury to impose life regardless of the weight of the aggravating circumstances. By requiring only a simple majority, and by instructing the jury to return a verdict for death whenever it finds that statutory aggravating circumstances outweigh mitigating circumstances, the Florida practice depreciates the jury's role far more than the national practice has generally found necessary or acceptable.

The degree to which states have chosen jury sentencing and jury inviolability is dramatic. The timing also is significant. "Only after *Furman v. Georgia* did eight states opt for judge sentencing. Notably, it was also after *Furman* that ten states

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question of whether the override of a jury's life verdict violates the state constitution. The case of *Lindsey v. State*, was affirmed by the Court of Criminal Appeals on November 1, 1983 (1 Div. No. 483) and is awaiting briefing in the supreme court. The remaining two cases are pending in the Court of Criminal Appeals: *Neeley v. State*, 7 Div. No. 145; *Jones v. State*, 1 Div. No. 377.

<sup>26</sup> There have been 83 overrides in Florida. The Florida Supreme Court has affirmed 20 of these death sentences, but of the 20 only 13 remain on Death Row. See Appendix B.

<sup>27</sup> See § D(1), *infra*.



adopted mandatory death laws. The *Woodson* plurality did not consider this development an indication of contemporary standards, attributing it instead to an erroneous assumption by those states that mandatory death laws were the only way to comply with *Furman's* 'multi-opinioned decision.' The enactment of judge sentencing after *Furman* should be viewed the same way, especially since all eight states choosing it had for decades used juries in sentencing capital defendants." Gil-  
lers, *Deciding Who Dies*, 129 U. Pa.L. Rev. 1, 43-44 (1980). The same is true for the jury override.

Evolving contemporary standards have resulted in the removal of the "onus of inflicting capital punishment" from the trial judge and entrusted the life or death decision to the common sense judgment of the jury. *United States v. Jackson*, 390 U.S. 570, 576 n. 12 (1968). This involvement of the jury in capital sentencing reflects the "reluctance to entrust plenary power over the life . . . of the citizen to one judge or a group of judges . . .," *Duncan v. Louisiana*, 391 U.S. at 156, and evinces a recognition that capital sentencing "places the real direction of society in the hands of the governed . . . and not in . . . the government." Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 (1966). Like the lesser included offense charge, "while [this Court has] never held that a defendant is entitled to [the practice] as a matter of due process, the virtually universal acceptance of the [practice] in both state and federal courts establishes the value to the defendant of this procedural safeguard." *Beck v. Alabama*, 447 U.S. at 638.

### C. Independent Judicial Judgment Confirms The Unacceptability Of The Jury Override

As noted in *Coker v. Georgia*, "the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S. at 598; accord *Enmund v. Florida*, \_\_\_\_ U.S. at \_\_\_\_, 102 S.Ct. at 3376; *Gregg v. Georgia*, 428 U.S. at 183.



Court's independent judgment should confirm the nearly universal legislative rejection of the jury override in death cases for several reasons.

The legislative shift from judge to jury sentencing, discussed above, occurred in response to two factors. The first was jury nullification. When death was mandatory for specified offenses, "jurors on occasion took the law into their own hands in cases which were willful, deliberate and premeditated in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense." *McGautha v. California*, 402 U.S. at 200. See also *Woodson v. North Carolina*, 428 U.S. at 280-92. But there was another, more fundamental reason for the shift: state legislatures recognized that the nature of the death decision is different in quality from a sentence of a term of years and that this difference requires jury sentencing.<sup>28</sup>

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<sup>28</sup> There are several indications in the patterns of legislative determination that the life or death decision is fundamentally a jury decision. First, if the penalty jury is unable to agree on sentence, all but one of the thirty states that use juries require a life sentence. If there were not a strong interest in having the jury make death sentence decisions, one would expect more lawmakers to have given the power to the court following jury disagreement. Second, of the twenty-nine states that require a jury to agree before death may be imposed, twenty-five explicitly require unanimity. Statutes in the remaining four are not explicit, but none permit a nonunanimous jury to impose death. Third, this pattern occurs despite *Witherspoon's* holding that scrupled jurors may not be challenged for cause from the penalty panel and despite the consequent reduction in a state's ability to control the composition of the sentencing jury. After *Witherspoon*, there was no movement to reduce the unanimity requirement, as a dissenter had suggested, or to shift the penalty decision to judges. Fourth, juries have been retained even though it is no longer possible for a state to limit by operation of law the evidence the sentencer hears in mitigation of penalty. See *Gillers, supra*, at 16-19. See also appendix C.

Not only is death irrevocable, but the motives for its imposition differ from punishments of even life imprisonment. Rehabilitation, an important goal in noncapital sentencing, see *Williams v. New York*, 337 U.S. 241, 248 (1949), is irrelevant here. Incapacitation has never been embraced by this Court as an objective of the death penalty, perhaps because imprisonment serves society's interest in removing potentially dangerous persons from our midst. See *Gillers*, *supra*, at 47. Deterrence is a matter of great importance to legislatures debating the death penalty, but not to particular sentencers deliberating whether the penalty should be imposed in a given case.<sup>29</sup> *Id.* at 49-53. Retribution stands as the primary motive impelling the sentencer's judgment that a particular defendant should die.

In *Gregg v. Georgia*, the Court reasoned that "capital punishment is an expression of society's outrage at particularly offensive conduct" and that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 428 U.S. at 184; see also *Furman*, 408 U.S. at 308 (Stewart, J., concurring); *id.* at 394-95 (Burger, C.J., dissenting); *id.* at 452-54 (Powell, J., dissenting). The plurality quoted Lord Justice Demming's statement that:

Punishment is the way in which society expresses its denunciation of wrong doing, and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the

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<sup>29</sup> To decide to execute a particular defendant on the basis of general deterrence would violate the *Lockett* principle that death sentences must be individualized. See *Gillers*, *supra*, at 47-53.

wrong-doer deserves it, irrespective of whether it is a deterrent or not.

*Gregg*, 428 U.S. at 184 n. 30.<sup>30</sup>

The Court's recent opinions reflect the centrality of the retributive justification for capital punishment.

[T]his retributive justification requires that capital punishment be imposed only on those who are deserving of society's ultimate sanction. See *Zant v. Stephens*, 51 U.S.L.W. 4891, 4895 (1983) (in order to avoid constitutional invalidation, aggravating factors must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"). Hence, the retributive nature of the capital sentence is reflected in the Supreme Court's frequently repeated concern . . . that the sentencer's focus be on the individual offender and his crime. *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). . . . The retributive justification for capital punishment requires that the sentencing decision turn in large part on considerations of the justice of imposing death on a given offender for committing a given crime. See *Zant v. Stephens*, 51 U.S.L.W. at 4895.

*Tucker v. Zant*, No. 83-8137, Slip op. at 4-5 (11th Cir. Jan. 20, 1984).

But if the decision whether to impose death in a particular case is essentially a retributive judgment, who is in the best

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<sup>30</sup> See also Stephen, *A General View of the Criminal Law of England* 99 (2d ed. 1890); van den Haag, *Punishing Criminals* 12-13 (1975); Berns, *For Capital Punishment*, 154-55 (1979); Packer, *The Limits of the Criminal Sanction* 43-44 (1968); Royal Commission on Capital Punishment, 1949-53, ¶ 52 (1953); Cohen, *Reason and Law* 50 (1950); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wisc. L. Rev. 781, 798; Greenwalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 Colum. L. Rev. 927, 929 (1969); Goodhart, *English Law and the Moral Law* 93 (1953); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Soc. Prob., 401 (1958). Cf. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

position to make that judgment, a judge or a jury? And what should we do when judge and jury disagree?<sup>31</sup> Resolution of both inquiries hinges on the relative reliability of the underlying determination that we ask the judge or jury to make.

Because the death decision is a retributive one and because retribution is an expression of the will of the community, a greater degree of reliability is achieved if the representatives of the community are heard from and followed. The kind of

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<sup>31</sup> The question is not a matter of merely theoretical importance. The two institutions disagree over death with some frequency. As of February 14, 1984, Florida trial judges have overridden jury verdicts of life in 83 cases, although only twenty have been affirmed and five of those were subsequently vacated on other grounds and two inmates died by suicide. *Post-Furman Death Sentences in Florida* (unpublished compilation prepared by Capital Punishment Project, University of Florida, Department of Sociology, Michael Radelet, Director) (copy available from counsel for petitioner) (See Appendix B). Florida's experience with its override makes clear that "we are not talking about alternative routes to the same destination." Gillers, *supra*, at 68.

The choice between judge and jury may matter in other ways as well. Two studies have concluded that Florida juries were less influenced by a capital defendant's race and socio-economic status than were judges:

There was no evidence that characteristics of the defendant influenced the decisions made by the juries. However, many of these characteristics (sex, employment status, relationship to victim, and type of attorney) were related to the final decisions of the judges. In other words despite the juries' unbiased recommendations the judges imposed the death penalty in a manner that was biased against males and the unemployed.

Foley, *Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty* (unpublished paper at the University of North Florida) (copy available from counsel for petitioner) (quoted in Gillers, *supra*, at 68 n. 318). See also Radelet & Vandiver, *The Florida Supreme Court & Death Penalty Appeals*, 74 J. Crim. L. & Criminology 401 (1983).

reliability discussed by the Court in cases such as *Lockett* refers to the accuracy of the decision to be retributive.

The retributive nature of the death decision suggests that the jury is best equipped to make that determination and, when the two institutions disagree, that the errors are being made by the judges choosing death, not the juries choosing life. The life override is a classic example of the proposition that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan v. Louisiana*, 391 U.S. at 157 (citing Kalven and Zeisel, *The American Jury* (1966)). The role of the jury in capital sentencing is to "maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a maturing society." *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968). The jury's job is to "introduce into the process a lay judgment, reflecting values generally held in the community concerning the kinds of potential harms that justify the state" in seeking a defendant's death. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).<sup>32</sup> That is a job that a jury can best perform.

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<sup>32</sup> The role of the jury as conscience of the community is perhaps most clear in a capital punishment scheme such as Florida's. The Florida Supreme Court has acknowledged repeatedly that the jury's decision on life or death "represent[s] the judgment of the community as to whether the death sentence is appropriate" in a given case. *McCampbell v. State*, 421 So.2d 1072, 1075 (Fla. 1982); accord *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983) (jury is "conscience of community"); *Quince v. State*, 414 So.2d 185, 187 (Fla. 1982) (quoting *Jones v. State*, 332 So.2d 615, 622 (Fla. 1976) (Sundberg, J., concurring)) ("jury represents the conscience and mores of the community in which the crime was committed"); *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981) (advisory sentence "represents the judgment of the community as to whether the death penalty is appropriate"); *McCaskill v. State*, 344 So.2d 1276, 1280 (Fla. 1977) (juries are the "conscience of our communities").

It is important to note that the issue here is not "jury nullification", i.e., the jury's exercise of its "power to bring in a verdict [of acquittal] in the teeth of both law and facts." *Horn- ing v. District of Columbia*, 254 U.S. 135, 138 (1920) (opinion of Holmes, J.). By expressing its judgment to spare the life of a particular defendant, the jury is not "nullifying" the law it has sworn to uphold; it is performing precisely the function for which it was empaneled. Its very role within our capital sentencing scheme is to bespeak community sentiment by exercising its own judgment. The jury's response is, by definition, society's response.

It follows that juries

are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come. The response of a representative jury of acceptable size is consequently taken to be the community response. The jury does not try to determine what the community would say, but in giving its conclusion, speaks for the community. The judge, on the other hand, must either assess the community's "belief" or "conscience" and impose it or must impose his own and assume it is the community's. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind.

Gillers, *supra*, at 63-64.

The role of the jury as a reliable "index of contemporary values," *Gregg v. Georgia*, 428 U.S. at 182, is summed up in the Chief Justice's dissenting opinion in *Furman*. "Legislatures prescribe the category of crimes for which the death penalty should be available, and, acting as the 'conscience of the com-



munity' juries are entrusted to determine in individual cases that the ultimate punishment is warranted." 408 U.S. at 388.<sup>33</sup>

The Court's reasoning in applying the Sixth Amendment's jury trial right to the states also supports the conclusion that the jury should make the capital sentencing decision. In concluding the right to jury trial is a fundamental principle of our system of liberty and justice, the Court reasoned that "a right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Duncan*, 391 U.S. at 155-57; accord *Ballew v. Georgia*, 435 U.S. at 229; *Williams v. Florida*, 399 U.S. at 100. Thus, "if the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial

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<sup>33</sup> The retributive decision is crucial at two stages in the legal process of deciding who dies: an inquiry into retribution plays a role at the legislative definitional stage, when the issue is what classes of people *may* be put to death, and also at the capital sentencing stage, when the issue is who, of the class delineated by the legislature, *will* be put to death. The legislature, in debating whether to have a death penalty at all, will evaluate the possible retributive value of the penalty. But the legislature cannot, consistent with *Lockett*, *Woodson*, and *Gregg*, make a one-time determination that the death penalty does serve the interest in retribution and thereby bar the sentencer from considering the matter. The capital sentencer, which, like the legislature, must also be a medium of public attitudes toward the death penalty, must apply those attitudes in every given case. The sentencer in a capital case performs the crucial function of assessing whether *that case* presents circumstances that, although not enumerated in the statutes' list of mitigating factors, nevertheless makes death an inappropriate penalty. *Lockett's* requirements, by demanding that a sentencer consider all mitigating circumstances proffered, thus ensures that an individual death sentence is consistent with evolving standards of decency in our culture.

processes in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—the reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.” *Duncan*, 391 U.S. at 157.

The reasoning in *Duncan* makes clear that the central function of the jury as a bulwark between the accused and the state is particularly important in death cases. The “inquiry must focus upon the function served by the jury in contemporary society.” *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). “[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen.” *Apodaca v. Oregon*, 406 U.S. at 411 (quoting *Williams v. Florida*, 399 U.S. at 100).

One commentator has persuasively argued that the reasoning of *Duncan*

applies with greater force to the search for reliability in death sentencing. In death sentencing, unlike traditional factfinding, there are no advantages to giving the responsibility to the trial judge. In factfinding, the Court has acknowledged that a trial judge may be more “tutored” than a panel of lay persons, that is, more able to assess credibility, put lawyers’ arguments in perspective and apply the law to the facts. Despite these possible advantages, a defendant is entitled to a jury sentence for the reasons given in *Duncan* and *Williams*. The sole function of the capital sentencing tribunal is to place the offender and the offense on the scale of the community desire for retribution. Adjusting this delicate balance gains nothing from the trial judge’s expertise in finding facts and applying law, but would profit from the “common-sense judgment” and “community participation” of a representative jury of adequate size.

*Duncan* also provided “negative” reasons for imposing a right to jury trial on the states. It told us that judges can be “compliant, biased or eccentric.” These risks do not disappear at death sentence proceedings. Furthermore, *Duncan*’s reference to the “fear of unchecked power,”

which has made us "reluctant" to give "a group of judges" complete control over factfinding where "life and liberty" are at stake, holds persuasively at capital sentencing, where life, death and the community will must be reconciled. In short, the dangers that *Duncan* saw in judicial control of guilt determination speak clearly to *Lockett's* wish for reliability in death sentencing.

Gillers, *supra*, at 66-67.

The Court has often considered the weight of scholarly authority in evaluating procedures concerning jury and death penalty practices. See, e.g., *Gregg v. Georgia*, 428 U.S. at 189-95. The consensus among scholars is that a jury's verdict for life should be binding. Although the *Proffitt* plurality cited sources to show that trial judges can play a useful role in capital sentencing, 428 U.S. at 252 n.10, a survey of the literature reveals considerable agreement that jury participation is highly desirable, if not mandated, in capital sentencing.<sup>34</sup> Both sources cited by the Court in *Proffitt* note with approval the prevailing practice of requiring a jury's consent for death sentences but leaving noncapital sentencing to experienced judges alone.<sup>35</sup> Several additional sources, including the Model Penal

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<sup>34</sup> See Liebman and Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo.L.J. 757, 819 n.273 (1978) (jury is appropriate, if not constitutionally mandated, capital sentencing forum); Manneheim, *The Capital Punishment Cases: A Criticism of Judicial Method*, 12 Loy.L.Rev. 85, 107-108, 131 (1978) (suggests requirement of jury consent for death in penalty phase under the Constitution); Gillers, *Deciding Who Dies*, 129 U. Penn.L.Rev. 1, 39-74 (1980) (jury consent for death constitutionally required).

<sup>35</sup> See American Bar Association Project on Standards for Criminal Sentencing, *Sentencing Alternatives and Procedures*, § 1.1, Commentary 47-48 (Approved Draft 1968) (giving reasons for requiring jury consent for death penalty); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force Report, *The Courts* 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

Code, endorse a system where the trial judge is the final sentencer but where an advisory jury's recommendation for life is binding.<sup>36</sup> One commentator, who compared several post-*Furman* systems, generally endorsed Florida's statute and case law but disapproved of the tension created between judge and jury when a jury's decision for life can be disregarded.<sup>37</sup> Even severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty.<sup>38</sup>

#### D. The Countervailing Considerations Are Insufficient To Justify The Override Procedure

Petitioner's position may be challenged on three grounds. First, Florida may have a compelling need for employing this unique procedural device. Second, there is the potential problem of jury nullification. Third, as the Court suggested in *Proffitt v. Florida*, judges' professional training and experience may make them better capital sentencers. As shown below, none of these countervailing considerations justify the override procedure.

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<sup>36</sup> American Law Institute, *Model Penal Code* 210.6 and Commentary at 133 (Prop. Off. Draft 1962); Togman, *supra*, 39 N.Y.U.L. Rev. at 53; Wollan, *The Death Penalty After Furman*, 1974 Crim. Justice Systems Rev. 213, 230; Symposium on Capital Punishment, 7 N.Y.L. Forum 249, 313 (1961) (opinion of Prof. Louis B. Schwartz); Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 Ark.L.Rev. 33, 52-53 (1972).

<sup>37</sup> Shipiro, *First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana*, 24 Loy.L.Rev. 709, 736, 743-747 (1978).

<sup>38</sup> See, e.g., Note, *Jury Sentencing in Virginia*, 53 Va.L.Rev. 968, 969 (1967); Rubin, *The Law of Criminal Correction* 375 (1973). LaFont, *Assessment of Punishment—A Judge or Jury Function*, 38 Texas L.Rev. 834, 838 (1960); Report of the Royal Commission on Capital Punishment, 1949-1953, ¶ 571.

1. Florida did not have a compelling reason for the override procedure

Florida's override in favor of death is based on no judgment, legislative or judicial, that such a procedure serves an important state interest. Rather, the override's only justification was the state's misapprehension that this device is required by *Furman*. *Furman* "[p]redictably engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett v. Ohio*, 438 U.S. at 600. Like the procedures at issue in *Woodson* and *Beck*, Florida's override was passed in "direct response to *Furman*," 438 U.S. at 600 n.7, and was a misguided attempt to "retain the death penalty in a form consistent with the Constitution." *Woodson*, 428 U.S. at 298.

In 1872, Florida entrusted its juries with the decision on death. There it remained until *Furman* in 1972. At the time of *Furman*, Florida was in the process of amending its 1872 law. *Furman* intervened and generated much confusion within the Florida political system.<sup>39</sup> The two houses of the Florida legislature divided sharply on the proper response to *Furman*. The Florida Senate believed that *Furman* required jury consideration of statutorily enumerated aggravating and mitigating circumstances. The jury would then, by majority vote, render an advisory opinion of whether death should be imposed; a verdict for life would be binding but a verdict for death advisory. See Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. Crim. L.

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<sup>39</sup> The Florida legislature responded to *Furman* by enacting its new statute in a matter of days at a Special Session in December 1972. The act was approved by the Governor on December 8 and took effect immediately. Florida thus became the first state to enact a post-*Furman* death penalty statute. See Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 Fla.St.L.Rev. 108, 126 (1974); see also Radelet and Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. and Criminology 401, 402 (1983).

and Criminology 10, 15 (1973). The Governor, Attorney General and State House of Representatives, however, read *Furman* differently. According to the House bill, the jury would be excluded from the penalty phase altogether. See Ehrhardt & Levinson, *supra*, at 15.

The resulting statute, formulated by a conference committee, was a compromise between the House bill and the Senate's proposal:

Because neither the House nor the Senate would retreat from its stance on the procedure and composition of the sentencing proceeding contained in the bill passed by each, a conference committee was necessary to resolve the differences. The statute finally approved is a hybrid: in return for the House's approval of a judge and jury sentencing procedure, the Senate abandoned its insistence that the jury have a determinative role in sentencing in capital cases. While the statute retains the Senate's philosophy that the jury should participate in the sentencing process, the jury now has the authority only to give an advisory sentence which can then be rejected by the trial judge if his findings regarding mitigating and aggravating circumstances justify such action.

Ehrhardt & Levinson, *supra* at 16.

The Florida Supreme Court's approval of the override has been based on the same misconception of *Furman*'s requirements. In the decision below the Supreme Court of Florida said that "allowing the jury's recommendation to be binding would violate *Furman*." *Spaziano v. State*, 433 So.2d 508, 512 (Fla. 1983); JA 49; accord *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1981); *Douglas v. State*, 373 So.2d 895, 897 (Fla. 1979). But "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg*, 428 U.S. at 199. *Furman* invalidated the prior capital sentencing schemes because they gave the sentencer unbridled discretion to impose death,<sup>40</sup> not because it gave the jury discretion to extend mercy.

<sup>40</sup> See *Anderson v. Florida*, 408 U.S. 938 (1972); *Pitts v. Wainwright*, 408 U.S. 491 (1972); *Boykin v. Florida*, 408 U.S. 940 (1972);



The legislative history and judicial construction of the override show that the state's decision to employ this curious procedural device was made solely<sup>41</sup> in an attempt to "retain the death penalty in a form consistent with the Constitution," *Woodson*, 428 U.S. at 298, rather than a legislative judgment that judges will render more reliable capital sentences. The Florida legislature, confronted with *Furman's* statement that unbridled jury discretion violated the Constitution and *McGautha's* statement that the formulation of standards to guide juries was impossible, reasonably believed that its override was constitutionally required.

## 2. Jury nullification is not a factor

Jury nullification occurs when a jury acts to acquit a defendant whom an omniscient observer would say was guilty beyond

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*Brown v. Florida*, 408 U.S. 938 (1972); *Hawkins v. Wainwright*, 408 U.S. 941 (1972); *Johnson v. Florida*, 408 U.S. 939 (1972); *Paramore v. Florida*, 408 U.S. 935 (1972); *Thomas v. Florida*, 408 U.S. 935 (1972); *Williams v. Wainwright*, 408 U.S. 941 (1972); *Anderson v. State*, 267 So.2d 8 (Fla.1972); *Chaney v. State*, 267 So.2d 65 (Fla.1972); *Reed v. State*, 267 So.2d 70 (Fla.1972); *In re Baker*, 267 So.2d 331 (Fla.1972); *Newman v. Wainwright*, 464 F.2d 615 (5th Cir. 1972); *Adderly v. Wainwright*, 272 F.Supp. 530 (M.D. Fla. 1972).

<sup>41</sup> Ironically, in *State v. Dixon*, 283 So.2d 1 (Fla.1973), the seminal case in which the Florida Supreme Court held its death penalty constitutional, the court justified the override in this way:

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

*Id.* at 8.

a reasonable doubt; the jury nullifies the law, and a factually "guilty" defendant is acquitted. But the decision on death is quite different:

Jury nullification, of course, goes to the question of whether a defendant will, on the one hand, be found guilty and be punished according to the strict dictates of the law, or, on the other, be forever free from any legal consequences of his criminal act. By marked contrast, when a jury declines to impose the death penalty upon one already convicted of a capital crime, the jury's exercise of community conscience and norms ordinarily will not result in the defendant being set free. In Mississippi, for example, the jury's sentencing alternatives for a capital offense are limited solely to capital punishment and life imprisonment.

*Washington v. Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981). In short, jury nullification results in the release of a "guilty" person. In Florida a binding life verdict would mean that the defendant will be incapacitated for a *minimum* of 25 years without parole.

More fundamentally, as discussed above, the jury, by reflecting the mores and values of the community in deciding who should die, is *following* the law. In a capital sentencing scheme such as Florida's, the jury's primary role is to place the defendant and his crime on the yardstick of community outrage.

### 3. The insufficiency of judicial expertise in capital sentencing

One may accept the general proposition that jury sentencing is required to ascertain the "conscience of the community" and still argue that judicial sentencing is needed to foster consistency among cases. In *Proffitt v. Florida*, the Court observed that "judicial sentencing should lead to greater consistency . . . since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252. But while judges may bring a variety of professional skills

to sentencing, those skills cannot substitute for a jury sitting as the "peers" of the accused.

Noncapital sentencing involves factors and considerations better understood by judges. For example, lay jurors would probably not be aware of the availability of rehabilitative resources in the jurisdiction, conditions in the prisons, the likelihood of recidivism for the given offense, or the competence of local parole officials. "Most of these sentencing considerations do not arise in the death penalty decision, and so the judge's greater knowledge and experience are not called upon." Gil-*lers*, *supra* at 57. But more importantly, "there is no way for a judge to equal what a jury can best bring to the capital sentencing process—the community's view." *Id.* at 57-58. This is the key to the retribution inquiry, and here it is the jury, more than the judge, that has the "expertise."

The concern with "individualization" expressed in *Lockett* and *Eddings* also renders questionable the theoretical relevance of "analogous" cases at the sentencing stage. *Lockett* emphasizes the differences between people, their "uniqueness," 438 U.S. at 605, when it comes to capital sentencing.

Judges, moreover, may not have expertise that would in fact materially promote consistency in capital sentencing. Whatever expertise judges may have in noncapital sentencing is derived from their substantial experience in performing that function. But capital cases in any one jurisdiction are relatively rare; the actual number of capital cases that any one judge may sit on will be yet smaller. Thus, the ordinary predicates that provide expertise and thus greater consistency in sentencing—frequency and experience—are lacking in capital sentencing.

Moreover, judicial sentencing itself has been criticized for its high degree of inconsistency; the recent trend is to replace the discretion of sentencing judges with specific guidelines and more limited options for terms of imprisonment. *See generally* ABA Minimum Standards in Sentencing § 3.1 et seq.; Hoffman & Meierhofer, *Application of Guidelines of Sentencing*, 3 L.

and Psych. Rev. 53 (1977); Partridge & Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Wash. D.C., Federal Judicial Center 1974); Fla. R. Crim. P. 3.701, 3.988. To the extent similar defendants will be sentenced by different trial judges, the judges will predictably apply different standards in capital cases just as they do now in noncapital cases.

Finally, it might be argued that a capital sentencing determination is more than simply a decision regarding retribution. The sentencer also makes findings of facts, and judges may have greater expertise in factfinding that justifies the corrective device of jury override. But such an argument would squarely conflict with *Bullington v. Missouri*, 451 U.S. 430 (1981).

Robert Bullington was initially sentenced by a jury to life imprisonment; following reversal of his sentence by the state appellate court, the prosecutor attempted to again seek the death penalty. The Court held that because the first proceeding resembled a trial on guilt or innocence and because the state had involved a jury in that proceeding, the jury's determination for life was an "acquittal" for double jeopardy purposes. Although prior cases had declined to extend double jeopardy protections to sentencing, the similarity of the procedural structure of *capital* sentencing to those found at a trial on guilt or innocence mandated a different conclusion. 451 U.S. at 439.

Every major feature of the Missouri penalty trial relied on in *Bullington* is also present under the Florida procedure: the clear-cut choice between only two sentencing alternatives; the requirement that the jury base its choice upon the evidence, guided by detailed legal standards; the requirement that the state prove the proffered aggravating circumstances beyond a reasonable doubt; the presentation of evidence by both sides; opening and closing arguments by counsel; jury deliberations; and a formal verdict. Compare *Bullington*, 451 U.S. at 438 & n. 10, with § 921.141(1) & (2), Florida Statutes; Florida Rule of

Criminal Procedure 3.780; *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973).

The chief distinction between *Bullington* and the Florida procedure is that a Missouri jury's life decision is made binding by statute while a Florida's jury verdict for life imprisonment is denominated "advisory." But the language and reasoning of *Bullington* suggest that this distinction cannot control. Under Florida law, the state is required to present its factual case on sentencing in a jury proceeding that has all the indicia of a trial. But if it fails, it gets a second bite at the apple before the judge; indeed, it is free to adduce additional information in the form of a pre-sentence report, as occurred in this case. *But cf. Presnell v. Georgia*, 439 U.S. 14 (1978). "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, [Florida] explicitly requires the jury to determine whether the prosecution has 'proved' its case.'" *Bullington*, 451 U.S. at 444 (emphasis in original); see § 921.141(2) & (3), Florida Statutes.

The mitigating and aggravating circumstances listed in the Florida statute are questions of fact. See *Ford v. Strickland*, 696 F.2d 804, 876 (11th Cir. 1983) (Anderson, J., dissenting). Whether a crime was committed for pecuniary gain; whether a defendant was under sentence of imprisonment; whether a defendant was previously convicted of a felony; whether a defendant knowingly created a risk of death to many persons; whether a defendant has a significant history of prior criminal activity; whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional distress; or whether the defendant's capacity to appreciate the criminality of or to control his conduct was impaired. These are all facts, and indeed are facts similar to factfindings traditionally made by juries at trials on guilt. The life or death decision depends on the existence or nonexistence of these facts. *Bullington* requires that a jury's findings of these facts must be deemed final.

In summary, the jury override procedure is constitutionally unacceptable. To the extent that the death decision is a deci-

sion whether to be retributive, the jury's verdict for life should be final. To the extent that the death decision involves findings of fact, *Bullington* mandates that the jury's findings cannot be overridden.

### III

**THE FLORIDA STANDARDS FOR THE OVERRIDE OF A JURY'S LIFE VERDICT ARE APPLIED IN A MANNER THAT DISCOUNTS THE JURY'S CONSIDERATION OF MITIGATING FACTORS AND THAT IS SO BROAD AND VAGUE AS TO VIOLATE THE CONSTITUTIONAL REQUIREMENT OF RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A PARTICULAR CASE.**

Petitioner's death sentence was the result of pincer-like constraints on the jury's ability to exercise its decision-making power in a reasonable and rational manner. On one hand, the jury was deprived of the ability accurately to gauge the weight of the evidence against petitioner because of the failure to charge the lesser included offenses. On the other hand, the jury's apparent attempt to proportion its verdict to petitioner's culpability at the sentencing phase was overridden by the judge.

Separately and together, these errors violated the Constitution. Together, they deprived this sentencing decision of any semblance of the reliability required by the Constitution. See *Zant v. Stephens*, \_\_\_ U.S. at \_\_\_, 103 S.Ct. at 2747. As set out in Point I, the failure to charge the lesser included offenses created the same risk of unreliability in the guilt determination that the Court found unacceptable in *Beck v. Alabama*, *supra*. As shown below, the application of the Florida override standards intensified this risk at the penalty phase, in violation of established constitutional requirements.

As articulated in *Tedder v. State*, 322 So.2d 908 (Fla. 1975), the Florida override standard focuses only on the reasons for imposing death: that "the facts *suggesting a sentence of death* should be so clear and convincing that virtually no reasonable



person could differ. . . ." *Id.* at 910 (emphasis added). But the Constitution requires that the jury be entitled to weigh matters reasonably relevant to mitigation. A jury override standard that does not take that weighing into account is constitutionally infirm under *Lockett*, 438 U.S. at 601 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

Consider the application of the *Tedder* standard in this case: The Florida Supreme Court found that "the facts suggesting that the death sentence be imposed over the jury's recommendation of life . . . meets the clear and convincing test . . ." of *Tedder*. 433 So.2d at 511; JA 48. But the jury's determination cannot be overridden solely on the basis of "the facts suggesting that the death sentence be imposed," *id.*, when "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 428 U.S. 262, 271 (1976).

The weakness of the evidence against petitioner, particularly with regard to the critical questions of culpability—i.e., the degree of his involvement and the level of his intent—is a relevant factor that the jury can consider as a reason "why [the death penalty] should not be imposed." *Id.*<sup>42</sup> See *California v. Ramos*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3446, 3456 (1983) ("the jury . . . is free to consider a myriad of factors to determine whether death is the appropriate punishment"). This is particularly true in this case, where the jury was not allowed to resolve at the guilt phase any reasonable doubts that it may have had about the degree of petitioner's culpability.

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<sup>42</sup> See American Law Institute, Model Penal Code § 201.6(1)(f) (Proposed Official Draft 1962) (quoted in *McGautha v. California*, 402 U.S. at 223); Royal Commission on Capital Punishment 1949-53 ¶ 39, p.12 (1953); *Blankenship v. State*, 308 S.E.2d 369, 371 (Ga. 1983); *Smith v. Balkcom*, 660 F.2d 573, 580-81 (5th Cir. 1981), modified, 671 F.2d 858 (5th Cir. 1982). Cf. *Green v. Georgia*, 442 U.S. 95, 98 (1979).

It is not a sufficient answer to say that whatever mitigating concerns the jury may have had were outweighed by the strength of the aggravating factors. First, the Florida Supreme Court made no finding concerning the relative weight of the aggravating and mitigating factors in this case. Rather, it affirmed the override because the aggravating factors alone were "clear and convincing." *Spaziano*, 433 So.2d at 511; JA 48. Thus, half of what the jury was to weigh was reevaluated by the Florida Supreme Court, the other half was ignored. But even if the Florida Supreme Court had reweighed the aggravating and mitigating factors, that would not have been a sufficient basis to override the jury's verdict. The Florida statute requires "separate determinations," first, that at least one statutory aggravating circumstance exists beyond a reasonable doubt, second, "that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances" and third, "that death is the appropriate penalty. . . ." *Barclay*, \_\_\_ U.S. at \_\_\_, 103 S.Ct. at 3430 (Stevens & Powell, JJ., concurring). It is "entirely possible" that the sentencer might "yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty." *Smith v. North Carolina*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 474, 474-75 (1982) (Stevens, J., opinion respecting the denial of certiorari). The record indicates that this jury had few doubts about the proper penalty; it returned a life sentence after only brief deliberation. By ignoring the jury's reasonable mitigating concerns, the override failed to "assure[ ] reliability in the determination that 'death is the appropriate punishment in [the] specific case.'" *Id.* (quoting *Lockett*, 438 U.S. at 601).

Perhaps at first blush, the *Tedder* standard may seem similar to that for a directed verdict or a judgment notwithstanding the verdict. See Fed.R.Civ.P. 50; but compare Fed.R.Crim.P. 29(c) (providing for motion for judgment of acquittal only). But it is not. The standard for a judgment notwithstanding the verdict is whether a jury could reasonably have decided as it did, given the evidence before it and the logical inferences

arising from that evidence. The life or death decision is different because it is not exclusively a factual question. This jury answered "no" to the constitutionally relevant question: whether the defendant deserves to die, a determination properly informed by the values and mores of the community as best expressed by the jury's verdict. Yet, Florida permitted the verdict to be overridden without consideration of the reasonableness of *that* determination, simply on the basis of the aggravating facts alone.

If an override of a jury's life verdict is ever constitutional, it may only be pursuant to a standard which recognizes—as Florida has done in its recent cases—"that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983). This standard gives full weight both to the jury's consideration of mitigating factors and to its assessment of the appropriateness of the death penalty in light of contemporary community values.

The *Richardson* standard, moreover, highlights another constitutional infirmity of *Tedder* as applied in this case: "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . ." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). A finding that "virtually no reasonable person could differ" with the imposition of the death penalty in a given case, *Tedder*, 332 So.2d at 910, is inherently subjective and unreliable.

"[R]easonable persons can differ over the fate of every criminal defendant in every death penalty case." *Spinkellink v. Wainwright*, 578 F.2d 582, 605 (5th Cir. 1978). In every jury override case a judge and a jury of twelve men and women have in fact disagreed on the appropriateness of the death penalty. And in more than half of the cases in which the Florida Supreme Court has affirmed a trial judge's override of a jury life

verdict, at least one Justice has dissented.<sup>43</sup> And in almost every one of those cases there was at least one plausible mitigating circumstance.<sup>44</sup>

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<sup>43</sup> The Florida Supreme Court has approved overrides in twenty cases. Thirteen of these cases contained dissents. See *Heiney v. State*, \_\_\_\_ So.2d \_\_\_\_, 9 Fla. L. Week. 54, 57-8 (Fla. 1984) (Boyd and McDonald, J.J., dissenting); *Lusk v. State*, \_\_\_\_ So.2d \_\_\_\_, 9 Fla. L. Week. 39, 41 (Fla. 1984) (Overton and McDonald, J.J., dissenting); *Stevens v. State*, 419 So.2d 1058, 1065 (Fla.1982) (McDonald and Overton, J.J., dissenting); *Miller v. State*, 415 So.2d 1262, 1264 (Fla. 1982) (McDonald and Overton, J.J., dissenting); *Buford v. State*, 403 So.2d 943, 954 (Fla.1981) (England, J., dissenting); *Zeigler v. State*, 402 So.2d 365, 377 (Fla.1981) (Sundberg and England, J.J., dissenting); *Johnson v. State*, 393 So.2d 1069, 1075-76 (Fla.1981) (McDonald and Overton, J.J., dissenting); *Hoy v. State*, 353 So.2d 826, 833 (Fla.1978) (England, J., dissenting); *Barclay v. State*, 343 So.2d 1266, 1272 (Fla. 1977) (Hatchett, J., dissenting); *Dobbert v. State*, 328 So.2d 433, 444 (Fla. 1976) (England, J., dissenting); *Douglas v. State*, 328 So.2d 18, 22 (Fla. 1976) (England, J., dissenting); *Sawyer v. State*, 313 So.2d 680, 682 (Fla. 1975) (Ervin, J., dissenting); *Gardner v. State*, 313 So.2d 675, 677 (Fla. 1975) (Ervin, J., dissenting).

<sup>44</sup> See *Lusk v. State*, \_\_\_\_ So.2d \_\_\_\_, 9 Fla. L. Week. 39, 41 (Fla. 1984) (Overton, J., dissenting) ("The jury could have reasonably believed the appellant's testimony that he had been threatened by the victim and feared for his life"); *Heiney v. State*, \_\_\_\_ So.2d \_\_\_\_, 9 Fla. L. Week. 54 (Fla. 1984), Brief of Appellant at 59-61 (doubt about guilt); *Routly v. State*, 440 So.2d 1257. (Fla.1983) (domestic difficulties; girlfriend left defendant and spent the night with victim; possible mitigating circumstances of age of defendant, lack of significant criminal activity and extreme emotional disturbance); *Porter v. State*, 429 So.2d 293, 296 (Fla.1983) (possible mitigating circumstances of age, lack of significant history of prior criminal activity and employment history); *Bolender v. State*, 422 So.2d 833, 837 (Fla.1982) (disparity between sentences received by defendant and codefendant; weakness of evidence of guilt, which was based on testimony of codefendant); *Stevens v. State*, 419 So.2d 1058, 1065 (Fla. 1982) (McDonald, J., dissenting) ("the jury could have con-

In reversing the death sentence in *Godfrey*, the Court looked to other Georgia cases on the same point and concluded that a properly limiting standard had been applied in those cases but

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cluded that Stevens participated in the robbery and rape but that [the codefendant] was the sole perpetrator of the homicide"); *Miller v. State*, 415 So.2d 1262, 1264 (Fla.1982) (McDonald, J., dissenting) (the homicide was "the combination of a drug and alcohol infested party;" "a psychologist testified that Miller has a weak ego, that he is a 'follower,' that he is whatever his environment may be around him . . ."); *Buford v. State*, 403 So.2d 943, 953 (Fla.1981) (doubt about guilt); *Zeigler v. State*, 402 So.2d 365, 376 (Fla.1981) ("The evidence establishes . . . the defendant has no significant history of prior criminal activity"); *White v. State*, 403 So.2d 331, 339, 340 (Fla.1981) (defendant was an accomplice in the capital felony committed by another and his participation was relatively minor); *Johnson v. State*, 393 So.2d 1069, 1075 (Fla.1981) (Sundberg, J., dissenting) ("There is nothing about the actual homicide itself to set it apart from the norm of murders—a single gunshot to the chest with death ensuing instantly and . . . the fusillade of pistol shots was initiated by the victim"); *id.* at 1076 (McDonald, J., dissenting) ("The victim initiated the shooting. . . . The testimony of the psychologist could lead one to believe that the defendant's apparent malevolent act against the victim was in fact an unexplained reaction to being fired at"); *McCrae v. State*, 395 So.2d 1145, 1154-55 (Fla.1981) (doctor testified that defendant was under the influence of extreme mental or emotional disturbance at the time the crimes were committed); *Dobbert v. State*, 375 So.2d 1069, 1070-71 (Fla.1979) (defendant subjected to childhood child abuse and period of mental stress preceeding the homicide); *Dobbert v. State*, 328 So.2d 433, 444 n.\* (Fla.1976) (England, J., dissenting) ("by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people might differ with him"); *Hoy v. State*, 353 So.2d 826, 833 (Fla.1978) (sentencing judge found the defendant's age and lack of prior criminal activity to be mitigating factors) (Governor subsequently commuted sentence to life); *Barclay v. State*, 343 So.2d 1266, 1271 (Fla. 1977) (age; minor involvement); *Douglas v. State*, 328 So.2d 18 (Fla. 1976) (bizarre love triangle; wife and defendant had previous relationship and lived together for ten days after murder of

not in the case before it. 446 U.S. at 429-33. An analysis of the Florida Supreme Court's override decisions leads to a similar conclusion. In a host of override cases, the Florida Supreme Court has applied the more objective "reasonable basis" test. For example, in *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982), the Florida court conducted "an objective review of the record" and found "that the action of the jury was reasonable." *Id.* at 175-76. It held that the jury could have found any of four nonstatutory mitigating circumstances and, in addition, could have considered the disposition of the codefendant's case as reflecting on appropriateness of the death penalty for McCampbell. *Id.* *Accord Herzog v. State*, 439 So.2d 1372 (Fla. 1983) (although judge found no statutory mitigating circumstances, there were nonstatutory mitigating factors including disposition of codefendant's case).

Similarly, in *Cannady v. State*, 427 So.2d 723 (Fla. 1983), the court found that "the jury may have given more credence to" certain testimony supporting statutory mitigating circumstances and that, therefore, "there is a reasonable basis for the jury's recommendation of life sentence." *Id.* at 731. This standard was applied to disapprove overrides in numerous other cases. See, e.g., *Richardson*, 437 So.2d at 1095; *Hawkins v. State*, 436 So.2d 44 (Fla. 1983); *Washington v. State*, 432 So.2d 44 (Fla. 1983); *Norris v. State*, 429 So.2d 688 (Fla. 1983).

Thus, although the Florida court has an objective standard that is capable of application in a meaningful manner to avoid arbitrariness in the override of jury life verdicts, it was not applied in petitioner's case. Had it been, the override could not have been affirmed. For as previously discussed, there was a reasonable basis for the jury's life verdict: the weakness of the

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husband); *Sawyer v. State*, 313 So.2d 680, 680-81 (Fla. 1975) (unintentional killing in the course of a robbery to support a \$200 a day heroin habit) (sentence subsequently commuted to life); *Gardner v. State*, 313 So.2d 675 (Fla. 1975) (husband murders wife after drinking spree in context of alcoholism and marital tension).



evidence regarding petitioner's culpability. The Florida Supreme Court has expressly validated such concerns in *McCampbell* and *Herzog*, where it held that the jury life verdict could reasonably have been based on consideration of the disposition of the codefendant's case. *But compare Davis v. State*, 90 So.2d at 632 ("the ultimate verdict at least suggests to us that the jury itself was in doubt [about guilt] and therefore reluctant to impose the supreme penalty. . . . This was, of course, within the orbit of their authority as jurors"); *Nims v. State*, 70 So. at 566 (same), *with Buford v. State*, 403 So.2d 943, 953 (Fla. 1981) ("A defendant cannot be a 'little bit guilty'").

The record strongly supports the conclusion that this was both the basis of the jury's verdict and the source of its disagreement with the judge. Unable to consider the "third option," the jury agonized over its verdict at the guilt phase. But the deliberations on sentence were short. The defense attorney specifically argued the weakness of the evidence as a reason for a life verdict, placing this consideration before the jury (TS 16-17). But the judge attempted to remove this factor from the jury's consideration, cutting off counsel's argument as allegedly improper (TS 18). This strongly suggests that the judge's subsequent disagreement with the jury and imposition of the death sentence was based at least in part on his failure to consider this factor.

Finally, the override in this case cannot be justified on the basis of "the prior conviction of a violent felony which the jury did not have an opportunity to consider . . .," *Spaziano*, 433 So.2d at 511; JA 48, for several reasons. First, it was the trial judge who held the prior conviction inadmissible at the penalty phase, thus keeping it from the jury. Second, to approve the override on this basis contravenes the very values that invalidated the sentence in *Bullington*. See discussion *supra*, Point II, at 43-44. Allowing a judge to consider in aggravation materials not before the jury would encourage prosecutors to "sandbag" defendants by holding back certain evidence in case the jury returned an advisory verdict of life with the hope of using it to persuade the judge to overrule the jury. Such tactics

by defense lawyers have, in recent years, increasingly drawn the Court's ire. The Constitution "cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors [by the jury] after all parties have agreed on the appropriate evidence to be considered." *Richardson*, 437 So.2d at 1095. In *Richardson*, the trial judge had overridden the jury's life recommendation because the jury "did not have the benefit of all of the evidence." *Id.* at 1095. The Florida Supreme Court reversed the trial judge's override, because it could not "countenance the derogation of the jury's role implicit in these comments." *Id.*; cf. *Messer v. State*, 330 So.2d 137 (Fla. 1976) (rejecting trial judge's reasoning that he could consider mitigating evidence not available to jury before actually imposing sentence); *Miller v. State*, 332 So.2d 65 (Fla. 1976) (same). But see, *Engle v. State*, 438 So.2d 803 (Fla. 1983); *Porter v. State*, 429 So.2d 293, 296 (Fla. 1983); *Smith v. State*, 403 So.2d 933, 935 (Fla. 1981); *White v. State*, 403 So.2d 331, 339-40 (Fla. 1981); *Brown v. State*, 367 So.2d 616, 625 (Fla. 1979).

The override of the jury's verdict in this case was based on a standard that cannot be squared with the Constitution. It impermissibly denigrated the jury's function. It unconstitutionally discounted relevant mitigating considerations that could reasonably have formed the basis of the jury's determination that death was not an appropriate punishment

in this case. And it is so vague and subjective, particularly when compared to the standard applied in other Florida cases, that the override in this case is wholly arbitrary.

### CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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**APPENDIX A**  
**CONSTITUTIONAL AND STATUTORY PROVISIONS**  
**INVOLVED**

**Constitution Of The United States**

**AMENDMENT V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**AMENDMENT VIII.**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT XIV.**

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Florida Statutes (1973)**

**782.04 Murder.—**

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery,

burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

**782.07 Manslaughter.**—The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

**921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.**—

(1) **SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.**—Upon conviction or adjudication of guilt of defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of



Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life \*[imprisonment] or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) **MITIGATING CIRCUMSTANCES.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

**932.465 Limitation of prosecutions.—**

(1) A prosecution for an offense punishable by death may be commenced at any time.

(2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period has elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

(3) Offenses by state, county, or municipal officials committed during their terms of office and connected with the

duties of their office shall be commenced within two years after the officer retires from the office.

**Florida Rules Of Criminal Procedure (1973)**

**RULE 3.490. DETERMINATION OF DEGREE OF OFFENSE**

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

# APPENDIX B

## FLORIDA JURY OVERRIDE CASES

NAME	JURY VOTE	Citation	FLORIDA SUPREME COURT Result
1. Joseph Taylor	unk.	294 So.2d 648 (Fla. 1974)	life
2. Jimmy Jones	12-0	332 So.2d 615 (1976)	life
3. Anthony Sawyer	unk.	313 So.2d 680 (1975)	upheld <sup>1</sup>
4. Howard Douglas	12-0	328 So.2d 18 (1976)	upheld <sup>2</sup>
5. James McCaskill	11-1	344 So.2d 1276 (1977)	life
6. Otis Williams	7-5	344 So.2d 1276 (1977)	life
7. Larry Thompson	12-0	328 So.2d 1 (1976)	life
8. Daniel Gardner	12-0	313 So.2d 675 (1975)	upheld <sup>3</sup>
9. Lloyd Swan	unk.	322 So.2d 485 (1975)	life
10. Jackson Burch	unk.	343 So.2d 831 (1977)	life
11. Darius Slater	11-1	316 So.2d 39 (1975)	life
12. Ernest Dobbert	10-2	328 So.2d 433 (1976)	upheld
13. James McCray	11-1	395 So.2d 1145 (1981)	upheld
14. Mack Tedder	unk.	322 So.2d 908 (1975)	life
15. Walter Carnes	unk.	Suicide before decision	
16. Michael Provence	unk.	337 So.2d 783 (1976)	life
17. Elwood Barclay	7-5	343 So.2d 1266 (1977)	upheld

<sup>1</sup> Received life sentence from trial court pursuant to motion to mitigate sentence. See Fla. R. Crim. P. 3.800.

<sup>2</sup> Federal habeas corpus relief granted. Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983)(cert. pending).

<sup>3</sup> Received life sentence following this Court's vacation of death sentence and Florida Supreme Court's subsequent remand for resentencing. See Gardner v. Florida, 430 U.S. (1977).

18. Franz Buckren	unk.	355 So.2d 111 (1978)	life
19. Glen Chambers	unk.	339 So.2d 204 (1976)	life
20. Henry Brown	unk.	367 So.2d 616 (1979)	life
21. Darrell Hoy	unk.	353 So.2d 826 (1978)	upheld <sup>4</sup>
22. Jesse Hall	unk.	381 So.2d 683 (1980)	new trial, resulting in life
23. Rodney Malloy	unk.	382 So.2d 1190 (1979)	life
24. Ernest Walker	unk.	Suicide before decision	
25. Joseph Spaziano	unk.	433 So.2d 508 (1983)	upheld
26. William Zeigler	unk.	402 So.2d 365 (1981)	upheld
27. Sonia Jacobs	unk.	396 So.2d 713 (1981)	life
28. Eddie Odum	unk.	403 So.2d 936 (1981)	life
29. Clifford Williams	unk.	386 So.2d 538 (1980)	life
30. Robert Lewis	unk.	398 So.2d 432 (1981)	resent. to life
31. Jack Neary	unk.	384 So.2d 881 (1980)	life
32. Alonzo Bryant	unk.	412 So.2d 347 (1982)	new trial, resulting in life
33. John Barfield	7-5	402 So.2d 377 (1981)	life
34. Robert Buford	unk.	403 So.2d 943 (1981)	upheld
35. Roy McKennon	unk.	403 So.2d 389 (1981)	life
36. Beauford White	unk.	403 So.2d 331 (1981)	upheld <sup>5</sup>
37. James Phippen	unk.	389 So.2d 991 (1980)	life
38. David Goodwin	unk.	405 So.2d 170 (1981)	life
39. Durham Stokes	unk.	403 So.2d 377 (1981)	life

<sup>4</sup> Death sentence subsequently commuted to life by Executive Clemency on June 12, 1980.

<sup>5</sup> Death sentence vacated by state post-conviction judge; state's appeal to the Florida Supreme Court pending.



40. William Welty	unk.	402 So.2d 1159 (1981)	life
41. Raleigh Porter	unk.	429 So.2d 293 (1983)	upheld
42. Guy Smith	8-4	403 So.2d 933 (1981)	life
43. Marvin Johnson	unk.	393 So.2d 1069 (1981)	upheld
44. Robert Heiney	unk.	So.2d _____, 9 Fla. L. Week. 54 (1984)	upheld
45. Thomas McCampbell	unk.	421 So.2d 1072 (1982)	life
46. Greg Engle	unk.	So.2d _____, 8 Fla. Law. Week 357 (1983)	resent.
47. Rufus Stevens	unk.	419 So.2d 1058 (1982)	upheld
48. Solomon Webb	unk.	433 So.2d 496 (1983)	life
49. Bobby Lusk	unk.	So.2d _____, 9 Fla. L. Week 39 (1984)	upheld
50. William Gilven	unk.	418 So.2d 996 (1982)	life
51. Earnest Miller	unk.	415 So.2d 1262 (1982)	upheld
52. Bernard Bolander	unk.	422 So.2d 833 (1982)	upheld
53. Gregory Mills	unk.	Pending, No. 59,140	
54. Michael Cannady	unk.	427 So.2d 723 (1983)	life
55. Donald Walsh	unk.	418 So.2d 1000 (1982)	life
56. Ervin McCray	unk.	416 So.2d 804 (1982)	life
57. Ricky Washington	12-0	432 So.2d 44 (1983)	life
58. Connie Livingston	unk.	So.2d _____, 8 Fla.L. Week. 420 (1983)	new trial
59. Dan Routly	unk.	440 So.2d 1257 (1983)	upheld
60. Derwin Norris	unk.	429 So.2d 688 (1983)	life
61. Anibal Jaramillo	12-0	417 So.2d 257 (1982)	released <sup>6</sup>
62. Ed Thomas	12-0	Pending, No. 61,170	
63. Fred Herzog	unk.	439 So.2d 1372 (1983)	life
64. Aubrey Livingston	unk.	Pending, No. 61,967	

<sup>6</sup> Florida Supreme Court held evidence of guilt insufficient to convict.

65. Robert Richardson	10-2	437 So.2d 1091 (1983)	life
66. David Hawkins	6-6	436 So.2d 44 (1983)	life
67. Freddie Jones	unk.	Pending, No. 62,098	
68. Adelbert Rivers	12-0	Pending, No. 62,127	
69. Charles Burr	unk.	Pending, No. 62,365	
70. David Gorham	8-4	Pending, No. 62,882	
71. Larry Brown	unk.	Pending, No. 62,922	
72. Alphonso Cave	6-6	Pending, No. 63,172	
73. Isaac Thompson	unk.	Pending, No. 63,398	
74. Juan Ramos	11-1	Pending, No. 63,444	
75. Bobby Francis	unk.	Pending, No. 64,148	
76. Robert Parker	unk.	Pending, No. 63,700	
77. Anthony Brown	unk.	Pending, No. 64,247	
78. William Eutzy	unk.	Pending, No. 64,212	
79. Harry Huddleston	12-0	Pending, No. 64,307	
80. Donald Brookings	unk.	Pending, No. 64,221	
81. Ira Amazon	7-5	Pending, No. 64,117	
SEXUAL BATTERY ONLY:			
82. William Shue	unk.	366 So.2d 387 (1978)	life
83. Lucious Andrews	12-0	So.2d 8 Fla. L. Week. 495 (1983)	=new trial; no death

General Source: Post-Furman Death Sentences in Florida (Unpublished compilation prepared by the Capital Punishment Project, Department of Sociology, University of Florida, Michael Radelet, Director) (copy available from counsel for petitioner).

## APPENDIX C

### JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATIONS

#### A Survey of National Legislative Practice 1972-1984

#### 1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum. Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1980) §53a - 46a	U (?)
DELAWARE	Code Ann (1982) §11-4209	L
GEORGIA	Code Ann §§17-10-30 <sup>1</sup> to 17-10-32 (Recodified 1983) <u>See Miller v.</u> <u>State</u> , 229 S.E.2d 376 (Ga. 1976)	L
ILLINOIS	Ann. Stats (1982) §38-9-1	L
KENTUCKY*	Rev. Stats. (1978 Cum. Supp.) §532.025	U (?)
LOUISIANA	Code of Crim. Proc. (Pck. Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code Art. 27, §413 (Amended 1983)	L
MASSACHUSETTS	1982 Chapter 279, §68	L
MISSISSIPPI	Code (1983 Cum. Supp.) §99-19-101	L

MISSOURI	Crim. Code (1979 Spec. Pamph.) §65.006	L
NEVADA	Rev. Stats. (1977) §§175.554, 556	U
NEW JERSEY	Statutes (1982) §2C: 11-1, et seq.	L
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) §31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck. Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum. Sup.) §16-3-20	L
SOUTH DAKOTA	State Laws (1979) Chapter 160: §23A-27A-4	L (?)
TENNESSEE	Code Ann. (1983 Cum. Sup.) §39-2-203	L
TEXAS	Code Crim. Proc. Art. §37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Sup.) §19.2-264.4	
WASHINGTON	Rev. Code Ann. (1981 Pck. Pt.) §10.95.030	U

WYOMING	Stats. (1983) §62-2-102	L (?)
UNITED STATES	49 USC §1473 (1976) Antihijacking Act	U

## 2. Jury Life Verdict Not Binding

ALABAMA	Code (1981) §13A-5-46	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1983) §35-50-2-9	U

## 3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev.Stats.Ann (1982) §13-703
IDAHO	Code (1978) §19-2515
MONTANA	Rev.Code (1977) §46-18-301
NEBRASKA	Rev. Stats. (1975) §29-2520
OREGON**	Rev. Stats. (1979) §163.116 (Repealed by 1981 Legislative Act, c. 873, §9)

## LEGENDS AND NOTATIONS

- L ..... Life sentence unless jury unanimously agrees on death
- U ..... Unanimous verdict required for either life or death
- M ..... Simple majority suffices for verdict of either life or death
- A ..... Alabama system: 10 jurors required for death, 7 jurors required for life
- T ..... Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

\* The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. §532.025(3) (1978 Cum.Supp.), it appears that a jury life decision is in effect binding under the Kentucky scheme.

\*\* The Oregon death penalty statute was declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (Cre. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut, Wyoming and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed. See also Gillers, supra, at 17 n. 73.

### OVERALL CATEGORIES

JURY LIFE VERDICT BINDING -----	30
JURY LIFE VERDICT NOT BINDING -----	3
PENALTY DETERMINED BY JUDGE(S) ALONE -----	<u>5</u>
TOTAL JURISDICTIONS -----	38

### PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING -----	30
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING ----	<u>3</u>
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION -----	33

\*\*\*\*\*

### RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY UNANIMOUS FOR DEATH (L) -----	23
UNANIMITY REQUIRED FOR EITHER LIFE OR DEATH (U) -----	7*
10 JURORS REQUIRED FOR DEATH 7 FOR LIFE (A) -----	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR DEATH (M) -----	1*
TEXAS PROCEDURE: SPECIAL PENALTY QUESTIONS (T) -----	<u>1</u>
SUBTOTAL OF JURISIDITIONS WITH JURY PARTICIPATION -----	33

\*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

\*\*\*\*\*

METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON LEGISLATIVE INFORMATION AVAILABLE TO February 14, 1984.



## APPENDIX D

### UTAH EXECUTIONS: DEATH SENTENCES AND JURY RECOMMENDATIONS

Prior to the decision of Furman v. Georgia, 408 U.S. 238 (1972), Utah had a capital statute which made the penalty mandatory unless the jury recommended mercy. In cases where the jury did recommend mercy, the court was extended discretion to impose a penalty of death or of life imprisonment.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967, when a moratorium on executions began which was to last nationwide for 10 years while federal constitutional questions were being resolved.

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

This survey shows that since at least 1948, there were no executions in Utah after jury recommendations of mercy.

### DEFENDANTS EXECUTED IN UTAH 1948-1967

<u>Name-Date of Verdict</u>	<u>Dist.Ct. # and Appellate Report</u>
1. Mares, Elisio J. Executed - 9/10/51 Verdict- March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 <u>State v. Mares,</u> <u>192 P.2d 861</u> (Ut. 1948)
2. Gardner, Ray Dempsey- Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist. Ct. #4803 <u>State v. Gardner,</u> <u>230 P.2d 756, 759</u> (Ut. 1951)

- |   |  |
|---|--|
| <p>3. Neal, Don Jesse<br/> Executed -<br/> 7/1/55<br/> Verdict -<br/> -----<br/> (see note)</p>         | <p>-----<br/> (see note)<br/> <u>State v. Neal</u>,<br/> 262 P.2d 756, 759<br/> (Utah 1953)<br/> Utah S. Ct. noted<br/> lack of jury mercy<br/> recommendation. <u>Id.</u><br/> at 759.</p>      |
| <p>4. Braasch, Vern A.<br/> Executed<br/> 5/11/56<br/> Verdict -<br/> Dec. 9, 1949</p>                  | <p>Iron Cnty. 5th<br/> Dist. Ct. #171<br/> <u>State v. Braasch</u>,<br/> 229 P. 2d 289<br/> (Ut. 1951)</p>   |
| <p>5. Sullivan, Melvin<br/> L.<br/> Executed -<br/> 5/11/56<br/> Verdict -<br/> Dec. 9, 1949</p>        | <p>Same as Braasch<br/> (co-defendant)<br/> <u>Sub- nomine</u><br/> <u>Braasch</u></p>   |
| <p>6. Kirkham, Barton<br/> K.<br/> Executed -<br/> 6/7/58<br/> Verdict -<br/> -----<br/> (see note)</p> | <p>-----<br/> (see note)<br/> <u>State v. Kirkham</u>,<br/> 319 P.2d 859, 862<br/> (Ut. 1958).<br/> Absence of jury<br/> mercy recommendation<br/> noted in opinion. <u>Id.</u><br/> at 862.</p> |
| <p>7. Rodgers, James<br/> W.<br/> Executed -<br/> 3/30/60<br/> Verdict -<br/> Dec. 14, 1957</p>         | <p>San Juan Cnty. 7th<br/> Dist. Ct. Crim.<br/> #243<br/> <u>State v. Rodgers</u>.<br/> 329 P. 2d 1075<br/> (Ut. 1958)</p>   |

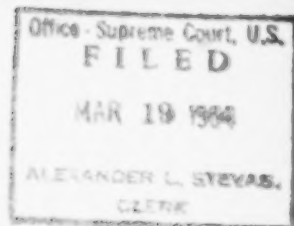
NOTE: In two cases, Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, there was a verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE  
RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED  
(THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE  
IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST)

<u>Name</u>	<u>Appellate Opinion Aff'g Sentence &amp; Date Commuted</u>
1. Markham, John	<u>State v. Markham, 112 P.2d</u> <u>496, 496-497 (Ut. 1941).</u> June, 1941
2. Matteri, Fred	<u>State v. Matteri, 225 P.2d</u> <u>325, 329-330 (Ut. 1950).</u> June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching the existence of any public clemency documents in these cases.

NO. 83-5596



IN THE  
Supreme Court of the United States  
October Term, 1983

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JOSEPH ROBERT SPAZIANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

On Writ of Certiorari to the  
Supreme Court of Florida

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BRIEF OF RESPONDENT ON THE MERITS

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CITATION TO OPINIONS BELOW

The Petitioner's statement is accepted.

JURISDICTIONAL STATEMENT

The petitioner's statement is accepted.

## STATEMENT OF THE CASE

The Respondent generally accepts the Petitioner's statement, adding only the following:

The record is silent as to where Mr. Spaziano was from August of 1973 until February 9, 1974, when he became a defendant in Orange County, Florida. (J.A. 32) The Petitioner was eventually implicated in this case by Anthony Dilisio, a witness in the Orange County case. (J.A. 32)

At the end of Petitioner's trial, defense counsel informed the court that the statute of limitations had run as to all lesser degrees of murder. (R 729) Defense counsel stated that a waiver of the limitations defense was being considered. (R 730) After a recess, however, the Petitioner invoked the defense, (R 753) and insisted that the jury not be instructed regarding any lesser offense, saying:

I understand what I'm waiving

I was brought here on first degree murder, and I figure if I'm guilty of this I should be killed. (R 754)

Petitioner did not appeal the failure to give lesser offense instructions, but did file, as "supplemental authority" the case of Beck v. Alabama, 447 U.S. 625 (1980). (J.A. 22) The Supreme Court of Florida distinguished Beck as inapplicable to this case. (J.A. 22)

### SUMMARY OF ARGUMENT

It is submitted that Mr. Spaziano has failed to present any claim sufficient to warrant relief.

The Respondent suggests that Florida law, which places the defense of limitations in the hands of defendants (for their discretionary use) and its related requirement that, in circumstances where the defense is available, it be waived in order to obtain the benefit of jury instructions on otherwise unprovable lesser offenses, does not offend the constitution.

The Respondent further submits that the State has the absolute authority to designate its fact finder and adjudicator in capital cases. Florida opposes the creation of any ad hoc rule that the "adjudicator" is determined by the outcome.

Finally, there is no legal or factual basis to the claim that Florida's jury override procedure is incapable of being

utilized because it creates an unattainable standard of review, to wit: "facts suggesting death so clear and convincing that no reasonable man could differ," on the theory that the threshold disparity between the judge's and jury's opinions reflect disagreement between reasonable men. If this was the intent of the Supreme Court of Florida when coining the phrase, it would have abolished jury overrides. Nor does this standard preclude review of all aggravating and mitigating factors, as amply demonstrated by Florida's frequent reversals of jury overrides.



## ARGUMENT

### I.

NEITHER THE EIGHTH AMENDMENT NOR THE DUE PROCESS CLAUSE REQUIRES THE GIVING OF JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES WHERE SAID INSTRUCTIONS ARE NOT SUPPORTED BY THE FACTS, REQUIRED BY THE LAW OR DESIRED BY THE ACCUSED.

The Petitioner comes before this Honorable Court seeking a ruling to the effect that "due process" requires trial judges to blindly give lesser included offense instructions in all capital cases in all jurisdictions without regard to the evidence, the law of the jurisdiction, or the desires of the accused. The Respondent opposes such a rule.

Spaziano begins his argument with an allegation that this case is before the Court "in precisely the same factual and legal posture as was Beck v. Alabama, 447 U.S. 625 (1980)." This is incorrect.

Mr. Beck was charged with first degree premeditated murder. Although Alabama

defines certain offenses (such as felony murder) as lesser included offenses of the crime charged, an Alabama statute prevented the jury from being advised of this fact no matter the evidence. Mr. Beck was shown to be guilty of the lesser offense of felony murder.

Spaziano was also charged with pre-meditated first degree murder. The actual evidence linking Spaziano to the crime came from a witness named Dilisio. Mr. Dilisio told a tale of horrid savagery, supporting no lesser offense than the crime charged.

In equating his case to Beck, Spaziano attempts to overcome this threshold problem by attacking the character and credibility of Mr. Dilisio's testimony in an effort to characterize it as proof of a lesser offense. It is suggested that Dilisio's testimony cannot be reweighed at this time. Tibbs v. Florida, 457 U.S. 31

(1982).

Mr. Spaziano also neglects to account for the fact that the statute of limitations is an essential element of the crime (a "jurisdictional fact") that must be proved. King v. State, 282 So.2d 162 (Fla. 1973). Absent proof of this fact, there is no proof of any lesser offense, and no verdict thereon is even possible. Perry v. State, 137 So. 798 (Fla. 1931); Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied, 379 So.2d 953 (Fla. 1980), U.S. cert. denied, Holloway v. Florida, 449 U.S. 905 (1980). In this case, the statute had run as to all lesser included offenses. Thus, the evidence did not "support" any conviction on any lesser included offense.

Third, Spaziano offers to interpret for the Court the reasons why the jury took six hours to reach a verdict, the impact of the court's alleged "Allen"

charge, and the jury's motive in recommending the sentence it did. None of these theories have any basis in the record and thus fall as the imaginings of the Petitioner.

Finally, Mr. Spaziano--not the court --rejected the jury instructions.

A. Florida's Statute of Limitations  
and Its Impact Upon Jury Instructions

Statutes of limitations did not exist at common law. They are legislative creations manifesting a concession by a sovereign of its right to prosecute stale cases. There is no federal constitutional right to a limitation of action, and thus the states vary in their treatment of them.<sup>1</sup>

Florida generally holds that its statutes represent a jurisdictional bar that

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<sup>1</sup> Statutes of Limitations are absolute bars to prosecution in some states but merely affirmative defenses in others, see e.g., State v. Latil, 92 So.2d 63 (La. 1956); State v. Rosen, 145 A.2d 158 (N.J. 1948).

is controlled by the defendant. Although it may be alleged at any time, Mitchell v. State, 25 So.2d 73 (Fla. 1946), it may be waived. Horton v. Mayo, 15 So.2d 327 (Fla. 1943); see Oliver v. State, 379 So.2d 143 (Fla. 3d DCA 1980).

As noted by Spaziano, one Florida case, Tucker v. State, 417 So.2d 1006, 1013 (Fla. 3d DCA 1982) has characterized the "right to waiver" as unresolved. That court, however, found nothing to indicate that waiver was undesirable or unconstitutional, stating:

Whether a defendant may waive the statute of limitations for purposes of jury instructions and possible conviction of a lesser included offense is an issue separate from that of the legality of prosecution of an offense barred by the statute. Holloway v. Florida, 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137, supra. A defendant who believes a criminal statute of limitations no longer works to his advantage should be permitted to waive that statute."

The Petitioner contends that

"forcing" Spaziano to waive his limitations defense unfairly compels him to trade "one right for another." In response, the State submits that the mere existence of a trade does not in and of itself create a violation of due process. Indeed, many strategic "trades" take place regularly without offending the Constitution. For example, a defendant has an absolute right to trade (waive) even constitutional rights if he deems it to be to his advantage. See Johnson v. Zerbst, 304 U.S. 458 (1938). Spaziano's "trade" does not begin to rise to that level. Indeed, it is a common practice in Florida for felons to have their cases presented on an "all or nothing" basis, in hopes of obtaining an acquittal because the crime, as charged, was not proved or to intimidate the jury into an acquittal rather than impose a harsh sentence on the basis of weak evidence. Our record reflects that Spaziano employed

both arguments.

Mr. Spaziano represents that the trial judge was required to instruct the jury on all lesser degrees of homicide by Brown v. State, 206 So.2d 377 (Fla. 1968). This is not correct.

Brown was the Supreme Court of Florida's seminal case on lesser included offenses and jury instructions under former chapter 919 of the Florida Statutes. In discussing homicides, the court noted that certain offenses which were not "necessarily lesser included offenses" were, by law, declared to be lesser offenses of first degree murder.

The court stated that these lesser offenses must be given to the jury if requested, but otherwise "should" be given. This was notwithstanding the legislature's use of the word "shall" in the controlling statute. §919.14, Fla. Stat. (1965).



The court made another observation not mentioned by Spaziano; namely that no appeal would be allowed from any failure to give lesser offense instructions in the absence of a proper record request, pursuant to section 918.10, Florida Statutes.

Effective January 1, 1968, the Florida Rules of Criminal Procedure took effect. The provisions of former section 919.14, Florida Statutes were carried over in Florida Rule of Criminal Procedure 3.490, while the duty to preserve appellate remedies by making a record request for the instructions carried over in 1970 when Florida Rule of Criminal Procedure 3.390(d) took effect.

Thus, when Spaziano came to justice in January of 1976, he had the right to waive any limitations defense and a duty to make a record request for jury instructions on any lesser offenses. Having not only failed, but actually refused, any

lesser instructions, Spaziano could not appeal the "court's failure" to give them. Indeed, he did not. Spaziano sent a copy of the Beck opinion to the Supreme Court of Florida without argument, as "supplemental authority."

Beck was disposed of as factually inapplicable because Spaziano's lesser offenses could not be proven. The Petitioner's Brown and statute of limitations arguments were not addressed. It is suggested, that Spaziano cannot obtain de novo federal review. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976); Anderson v. Harless, \_\_\_ U.S. \_\_\_, 103 S.Ct. 276 (1982).

Florida's treatment of its statutory defense of limitations, and its Supreme Court's interpretation of its rules, do not present federal or constitutional issues, even if this Court would have arrived at a different result. Gryger v. Burke, 331 U.S.

728, 68 S.Ct. 1256 (1948).

This brings us to Holloway v. State, 362 So.2d 333 (Fla. 3d DCA 1978), cert. denied, 379 So.2d 953 (Fla.), U.S. cert. denied, Holloway v. Florida, 449 U.S. 905 (1980). Holloway states that defendants are not entitled to jury instructions on lesser offenses for which the statute of limitations has run because those lesser offenses cannot be supported by evidence. See Perry v. State, 137 So. 798 (Fla. 1931).

Another Florida court reached the same conclusion in Keenan v. State, 379 So.2d 147 (Fla. 4th DCA 1980) and, of course, the issue was addressed in Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982).

In denying certiorari in Holloway the Florida Supreme Court implicitly rejected any Brown-based claim that lesser offense instructions are required where the statute of limitations had expired.

Clearly, Florida courts have

resolved this issue of state law against the Petitioner.

B. "Due Process" Considerations

"Due process" is often tritely misused as a synonym for "the petitioner did not care for the result." Constitutional due process means only that "the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934).

It is submitted that Florida's treatment of lesser offense instructions in cases where the statute of limitations has run is neither unreasonable, arbitrary, nor capricious.

Here, again, we distinguish Beck because no limitations problem existed there and, as a result, evidence existed proving the lesser offense. Since Florida

equates limitations with an element of the crime, it is impossible to have sufficient evidence to prove a lesser offense if the statute has run.

In denying certiorari in Holloway, thus implicitly rejecting a Brown-based claim<sup>2</sup>, the Florida Supreme Court (and its District Courts of Appeal, in their turn) has treated this situation in the same manner as the federal courts. That is, absent an evidentiary base, the lesser offense instruction is not required. Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993 (1973); Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980); see United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971), F. R. A. P. 31(c).

The federal standard was summarized neatly in United States v. Thompson, 492

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<sup>2</sup>Brown, like Beck, never confronted this issue.

F.2d 359 (8th Cir. 1974), where the requisites of a lesser offense instruction included a proper request for the instruction and a basis in the evidence.

Florida's standard affords as much protection, if not more. In addition, Florida places in the hands of the defendant the power to compel instructions on lesser offenses despite a "lack of proof" by waiving a limitations defense.<sup>3</sup> Since the option rests with the defendant and not the state, and since no constitutional rights are involved, "due process" is not violated.

Spaziano complains that his jury was out for six hours and eventually recommended a life sentence, causing him to speculate that a "deal" was made regarding his fate, and that the jury possibly would

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<sup>3</sup>This compares to the federal requirement of "mutuality" as a prerequisite for a lesser offense instruction. (i.e., the instruction must be available to both sides.)

have shown mercy upon him and only convicted him of a lesser offense. Lesser offense instructions do not exist to provoke "mercy" verdicts. Kelly v. United States, 370 F.2d 227 (D.C. Cir. 1966), cert. denied, 388 U.S. 193 (1967); United States v. Sinclair, 444 F.2d 888 (D.C. Cir. 1971).

### C. Final Considerations

The Honorable Justices Marshall and Brennan, in their dissent in Spaziano v. Florida, 454 U.S. 1037 (1981), stated that a defendant should not be penalized because the state failed to bring him to trial within the limitations period. It is respectfully suggested that this approach is analagous to the "don't let a good boy go bad, lock your car" philosophy of the 1960's. When someone like Spaziano hacks up a body, conceals it in a dump and evades arrest for two years, is it the state that has penalized him--or Spaziano who has penalized himself. Just because one has a



"presumption of innocence" does that create a "right" to flee? If so, why are "flight to avoid prosecution" and "escape" crimes?

True, by hiding out Spaziano "lost" a line of defense, but by no stretch of the imagination was he unfairly penalized by the state of Florida.

Spaziano's brief neglects to state what instructions are to be given in cases such as his.

The Respondent asks, is the trial court expected to hoodwink the jury by misstating that Spaziano "could" be convicted of a lesser offense when in truth he could not? Or, on the other hand, is the trial court to advise the jury of the lesser offenses and tell them, because the statute of limitations has run, that a conviction is not possible?

To be sure, Spaziano would have us lie to the jury. Under his theory, the jury would not be advised of the juris-

dictional fact--so they would not look for it. Then, he could prevail if the jury felt (compromised) it should give him the benefit of the doubt in a close case or if it exercised the phenomenon known as the "jury pardon."

Can we imagine the outrage and disrespect for our already beleaguered judicial system if juries were told they "could" convict on a lesser offense and then, upon doing so, suffered a "gotcha" surprise as the man they convicted was set free?

Florida considers it improper to hoodwink or deliberately mislead juries, Perry v. State, 137 So. 798 (Fla. 1931), and it is suggested that the conduct is ethically proscribed as well. We cannot engender any respect for our judicial system by institutionalizing chicanery.

That brings us to the next option, fully informing the jury that there are

lesser offenses for which the statute of limitations has run, so that a verdict of guilt on a lesser offense will result in the defendant's release.

If Spaziano is afraid that an "all or nothing" presentation will prompt a jury to return a guilty verdict rather than free him, those same fears would materialize under this second approach.

So, do we lie to the jury and surprise them by setting the defendant free, or do we fully inform them so that (essentially) the choice remains "all or nothing." One result is distasteful, deceitful and unethical, the other is a meaningless exercise, therefore, no reason exists to compel the giving of instructions not supported by the evidence.

The bottom line is that Spaziano's complaint can only be validated by ignoring Florida's interpretations of its procedural laws--substituting federal inter-

pretations, then reweighing the courtroom evidence on appeal, then ignoring his procedural default (by not requesting the instructions) and finally institutionalizing deceptive practices. There simply is no legal, factual, or public policy merit to Spaziano's complaint.

## II.

THE STATE OF FLORIDA PROPERLY  
VESTS FINAL SENTENCING AUTHOR-  
ITY IN ITS TRIAL JUDGES SUB-  
JECT TO REVIEW IN THE STATE  
SUPREME COURT.

This argument addresses Spaziano's arguments regarding Florida's capital sentencing procedures.

It is respectfully submitted that Spaziano's complaint is vague and his solution to the problem totally undiscernible.

Spaziano asserts that jury overrides are improper because "societal trends" dictate vesting juries with final author-

ity, because juries reflect societal values in their decisions while judges do not, because scholars (unidentified) feel juries should impose sentence and because most states let the juries impose sentence. After all of this, however, Spaziano states that these ostensibly controlling factors only apply when the defendant is sentenced to death after an override.

By extrapolation, none of Spaziano's meritless social theories or incorrect legal statements dictate that jury recommendations should be binding if the recommendation is death.

How is Florida to implement such a system? Is the State to simply have an ad hoc rule that every life recommendation by a jury is valid but every death recommendation is invalid? Shall every override in favor of death be void, but every life override be valid?

The Respondent is unaware of any

legal authority, and Petitioner presents none, supporting the proposition that the constitutionality of any criminal procedure depends on the result obtained. The closest analogy the Respondent can draw would be a system (under the Spaziano-result-based theory) whereby Fourth Amendment claims would be evaluated on the basis of "what" was found, or Fifth Amendment violations assessed on the basis of "what was said." Spaziano's legal theorem is totally meritless.

It is suggested that the constitutional analysis must focus upon the procedure under review, not the outcome of a particular case.

Spaziano states that, per Gregg v. Georgia, 428 U.S. 153 (1976), Florida's override procedure should be examined through a two-step analysis of contemporary societal values (trends) and threshold constitutionality. Spaziano properly

concedes the threshold issue, per Proffitt v. Florida, 428 U.S. 242 (1976) and Dobbert v. Florida, 432 U.S. 282 (1977). Proffitt in particular holds (in Mr. Justice Powell's concurrence) that "jury sentencing" is not required by the constitution.

This brings us to the question of societal trends, dwelt upon at length by Spaziano and the amicus curiae.

Since the defendant at bar finds it to his personal advantage to "prefer" a binding jury recommendation as opposed to an advisory one, and since he perceives a social trend in that direction, he asks this Court to revamp Florida's procedures to suit his needs.

In McGautha v. California, 402 U.S. 183, 195-6 (1971), this Honorable Court said:

Before proceeding to a consideration of the issues before us, it is important to recognize and underscore the nature of our responsibilities in judging them. Our function is not to impose



upon the states, ex cathedra, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures.

In Swisher v. Brady, 438 U.S. 204

(1978) this Court reaffirmed that the "factfinder" and the "adjudicator" are entities designated and empowered by the state.

Despite these considerations, Spaziano and the amici curiae suggest that historic trends toward trials by jury dictate sentencing by jury.

Actually, if any societal trend or contemporary value is relevant to this inquiry, it is society's quest for a reliable, guided, consistent and unbiased sentencing procedure in the post-Furman<sup>4</sup> era. In modern times, the trend has been away from "unbridled jury discretion" (a phase that calls into question Spaziano's claims that

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<sup>4</sup>Furman v. Georgia, 408 U.S. 238 (1972).

juries are better suited to impose sentence than judges) and towards a guided system of checks, guidelines and cross-checks.

In Florida, a sentencing hearing takes place in the presence of the judge and jury. The jury renders a layman's opinion on sentencing, then the judge imposes sentence. Overrides occur "both ways" at this stage. After sentencing, mandatory review of any death sentence is conducted by the Florida Supreme Court.

One cannot realistically read Proffitt, Dobbert, Barclay v. Florida, \_\_\_U.S.\_\_\_, 103 S.Ct. 3418 (1983); or Furman itself and detect any trend towards mandatory jury sentencing. Indeed, Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978) and Proffitt call into question the need for any jury participation at all.

Thus, utilizing Spaziano's own two-part test, we find neither a social-theory, nor a constitutional defect argument

against Florida's override procedure. Again, however, the Respondent notes that this appeal does not question the override procedure. Rather, Petitioner requests a new ad hoc procedure under which life recommendations are per se proper and binding, while death recommendations are not.

Failing to justify the result-bias social theory, Mr. Spaziano addresses the applicability to this cause of Bullington v. Missouri, 451 U.S. 430 (1981).

Bullington was tried and convicted of capital murder. Then, pursuant to Missouri law, a separate sentencing trial took place pursuant to which a binding jury verdict of life was rendered. Bullington won a new trial on the guilt issue and was convicted anew.

This Court found the existence of what is best called two trials, one on guilt, one on the proper sentence. Distinct findings of fact had to be made by the trier

of fact at every stage. At every stage, the trier of fact was the jury. Sentence was imposed by the jury.

Florida's procedure is not like Missouri's. Florida, as is its right, has designated the trial judge to be the finder of fact. It is the judge, not the jury, who reports what aggravating and mitigating factors have been proved. It is the judge, not the jury, who sees the presentence investigation if he (the judge) chooses to order one. The trial jury is allowed to add its opinion to the judge's sentencing decision, and as a matter of grace that opinion is afforded great weight. The sentence, however, is determined by the judge.

Apparently Spaziano urges a construction of Bullington to the effect that the presence of the jurors in the courtroom at sentencing requires mandatory, binding jury sentencing even if the jury, under the law of the jurisdiction, was only

present in an advisory capacity.

Bullington does not say that.

Bullington, drawing upon Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) merely states that once the designated trier of fact in an adversary proceeding determines the merits of a claim, the issue cannot be retried absent a reversal on some ground other than insufficiency of the evidence to support the verdict. Thus, because Bullington had a sentencing trial, which itself was not reversed, he could not be forced to "run the gauntlet" anew.

This really does not affect Florida's procedure. Our designated fact-finder and adjudicator during sentencing hearings is the judge. If a judge sentences a capital felon to a life sentence, Bullington would merely require that, upon any retrial, and subject to North Carolina v. Pearce, 395 U.S. 711 (1969), the judge could not force a retrial on the sentencing issue.

Thus, Bullington is not concerned with who the fact finder is, but just how many times the defendant has to persuade him. See United States v. DiFrancesco, 449 U.S. 117 (1980).

### III.

#### FLORIDA'S JURY OVERRIDE PROCEDURE IS CONSTITUTIONAL AS WRITTEN AND APPLIED.

Spaziano's third argument is not so much a complaint regarding Florida's jury override procedure as it is an attack on the outcome of this particular case.

Spaziano's first argument is that because Tedder v. State, 322 So.2d 908 (Fla. 1975) uses language to the effect that the "facts suggesting death" must be clear and convincing, no analysis is made of facts suggesting anything else. This argument distorts grossly the meaning of Tedder.

Any analysis of any case where death

is imposed must, in deciding whether the facts suggest a sentence of death, by its very nature incorporate a review of the mitigating evidence. Indeed, given the excellent record of the Supreme Court of Florida in reversing jury overrides, this argument is best characterized as specious.<sup>5</sup> See also, Proffitt v. Florida, 428 U.S. 242, 253 (1976) (re: general reversals of death sentences).

Aside from twisting some selected phrases out of context, Spaziano has cited no legal authority for his claim that Florida does not permit reviewing courts to weigh mitigating evidence.

Spaziano asserts that the Tedder standard cannot be satisfied because in virtually every override case reasonable people somewhere have differed regarding the appropriate sentences, citing Spinkellink v.

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<sup>5</sup>As noted by Spaziano, out of 83 overrides only 20 have been affirmed.



Wainwright, 578 F.2d 582 (5th Cir. 1978).

Particularly singled out are the jurors and the trial judge on one side, and the dissenting Florida Supreme Court justice on the other.

The Tedder court did not intend, in creating a harsh standard, to create an unattainable standard. In stating that "virtually no reasonable person could differ," the court, (which assuredly was aware of the jury recommendation and its own dissenting brethren) spoke in qualitative, not quantitative terms. Indeed, reasonable people may have unpersuasive, incorrect or unreasonable reasons for their conduct on any given occasion. Perhaps, for example, the jury acted unreasonably in resolving a case with a quotient verdict, or improperly injected itself into the sentencing phase of a case, choosing to grant a "jury pardon" or compromising in some other manner. Were the jurors

reasonable? Perhaps, but their conduct was not.

Likewise, appellate judges reviewing cold transcripts may yield to the temptation to reweigh evidence, despite Tibbs. When the search for legal sufficiency is thus tainted, the reasonableness of the result may suffer without regard to the reasonableness of the man.

Again, it must be remembered that Spinkellink's conviction and sentence was affirmed, and he was executed, notwithstanding the dicta relied upon by Spaziano.

This brings us almost full circle to the crux of Spaziano's case. He does not want the Court to abandon its prior decisions, nor does he suggest that any Florida procedure is itself violative of the constitution. What Spaziano wants is special treatment for himself. Since he was sentenced to death, he wants a trial de novo in this Court. He closes his

brief the way he began it, attacking the weight and credibility of the testimony that convicted him.

The final assertion of Spaziano, that the trial judge improperly considered his rape/mutilation of a lady in Orlando, is again a distortion, and was not raised in his petition for certiorari.

The representation is also in error. The transcript of the resentencing (RS 222) shows that the court considered Spaziano's Orlando crime even though the advisory jury did not. (That crime was incorrectly kept from the advisory panel.) Therefore, nothing "new" was presented in resentencing.

Since resentencing occurred at Spaziano's insistence, he is hard pressed to complain about it in any event.

Finally, Spaziano comes before the court on the basis of a death sentence imposed following a non-jury proceeding. No jury attended, no jury advised the

court, no jury suggested a sentence. The sole trier of fact in the room was the judge. Thus, no jury override took place in imposing the sentence at bar, and no claim exists.

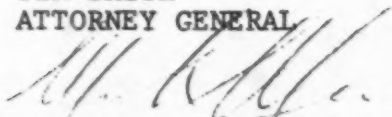
### CONCLUSION

Having seen Spaziano's brief, we see that he has obtained review on the premise of presenting constitutional issues relating to this Court's decisions in Beck and Bullington. Now that he is "in the door," however, he concedes the propriety and constitutionality of Florida law, but requests special dispensation and ad hoc rule-making for the exclusive benefit of his case. In doing so he requests reinterpretation of state law, ad hoc rule-making, reweighing of evidence, and relief from his own strategic choices.

Relief should be denied.

Respectfully submitted this \_\_\_\_ day of  
March, 1984.

JIM SMITH  
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read 'M. C. Menser', written over the printed name.

MARK C. MENSER  
Assistant Attorney General

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MOTION FILED  
FEB 23 1984

No. 83-5596

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In The  
**Supreme Court of the United States**  
October Term, 1983

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JOSEPH ROBERT SPAZIANO,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE AND BRIEF OF AMICUS CURIAE ON THE  
MERITS IN SUPPORT OF PETITIONER

---

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*Amici Curiae*



**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE**

The petitioner has consented to the filing of this brief, but the respondent has withheld its consent. The petitioner's letter of consent has been filed with the Clerk.

The amici curiae seek permission to jointly file this brief in support of the petitioner in this cause pursuant to Rule 36.3. The present case is before the Court for oral argument. The interest of amici is set forth in the statement of interest appearing in the brief.

The issue of application of the death penalty where a trial jury has determined that a sentence of life imprisonment is the appropriate sentence is a question of major importance to the fairness of procedures utilized in capital sentencing decisions. This issue has not been squarely considered or addressed in previous decisions. This is the first time that this procedure has been given plenary review by this Court.

Because of the experience of the amici and their deep concern for the fairness of judicial procedures, they have analyzed the due process considerations in an historical context which the parties would be unable to do. This analysis should assist the Court in consideration of the case before it.

Wherefore, it is respectfully requested that leave be granted to file this amicus curiae brief.

Respectfully submitted,

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No. 83-5596

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## INTEREST OF AMICI CURIAE

The amici curiae have no financial or proprietary interest in the outcome of this case. Rather, they have by their experience throughout their careers developed a deep interest in the fairness of judicial procedures and significant experience and knowledge of the functioning of our system of justice.

Richard W. Ervin is a former Attorney General of the State of Florida and a former Justice and former Chief Justice of the Supreme Court of Florida who is engaged in the practice of law in Tallahassee, Florida.

Thomas A. Horkan, Jr. is an attorney in Tallahassee, Florida, and is Executive Director of the Florida Catholic Conference and Counselor to the Catholic Bishops of Florida.

Ramsey Clark is a former Attorney General of the United States who is engaged in the practice of law in New York City.

The amici have jointly filed this brief to discuss solely the constitutional validity under the Due Process Clause of the procedure at issue here of the imposition by a State of a death sentence after a trial jury has determined that the defendant's life should be spared. The Court has not previously focused upon this issue. Amici are able to provide a concise discussion of this question that is relevant to disposition of the cause. This should aid the Court's consideration of the issue on the merits.

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**BRIEF OF AMICUS CURIAE ON THE MERITS  
IN SUPPORT OF PETITIONER**

---

**SUMMARY OF ARGUMENT**

This case focuses on the delicate relationship between judge and jury in deciding the life, or death of a defendant. May the State of Florida authorize a trial judge to impose a sentence of death, despite a jury's decision for life made after a full trial of the penalty issues?

We assume that the petitioner will address other relevant constitutional issues and that petitioner will



elaborate the Florida statutory procedure. We will discuss only the application of the Due Process Clause of the Fourteenth Amendment to the challenged procedure. This procedure conflicts with basic values of our Anglo-American legal heritage: the absolute finality of a jury's decision for the accused, the predilection to err on the side of mercy, and the evolving standards of caution and restraint in the use of capital punishment.

Under *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), Florida trial judges may properly impose a death sentence after a jury life determination only if "virtually no reasonable person could differ." Thus constitutionally prohibiting this practice should have little impact on Florida's over-all capital punishment scheme.

\* \* \* \*

In *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.20 (1968), this Court announced a new doctrine that deciding life or death involves "much more . . . than a simple determination of sentence." Subsequent cases have confirmed and amplified this axiom of modern death penalty jurisprudence. Hence procedures used to decide life or death must be tested against "evolving standards of procedural fairness," see *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

Until now, Florida's procedure of imposing death despite a jury decision for life has never been so tested.

In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), Florida enacted a death penalty scheme which has been found constitutional as a whole. See *Proffitt v. Florida*, 428 U.S. 242 (1976) (facial constitutionality); *Dobbert v.*

*Florida*, 432 U.S. 282 (1977) (ex post facto claim); and *Barclay v. Florida*, — U.S. —, 77 L. Ed. 2d 1134 (1983) (claim of arbitrariness). While it is true that *Dobbert* and *Barclay* involved a situation where a jury life recommendation had been set aside, the prior decisions do not focus upon due process concern nor has there been a decision on whether the procedure violates the Due Process Clause.

The prior cases answered two main questions: (1) whether Florida's new system promotes rationality and consistency at the trial and appellate levels; and (2) whether it provides adequate avenues for mercy.

By definition, correcting any unreasonable jury decision must promote rationality and consistency, see *Proffitt*, 428 U.S. at 252, and *Barclay*, — U.S. —, —, 77 L. Ed. 2d at 1157 (Stevens, J., concurring). In terms of Florida's overall system, the adverse nature to some defendants of overriding a jury life decision when "virtually no reasonable person could differ" may seem unimportant when contrasted with the many avenues of mercy open after a jury decision for death, see *Dobbert*, 432 U.S. at 295-296. The Court indicated that overruling an unreasonable jury life determination may be constitutional when judged under these specific criteria alone.

But while rationality and consistency are essential to the rule of law, until all relevant values are considered, there can be no definitive due process adjudication.

In *Duncan v. Louisiana*, 391 U.S. 145, 154-155 (1968), the Court rejected "weighty and respectable dicta" asserting that the States need not provide jury trial in serious criminal cases, but evoking seven centuries of profound

experience not explored in such dicta, the *Duncan* Court held that jury trial is indeed fundamental to our scheme of ordered liberty and due process.

In *Jackson v. Denno*, 378 U.S. 368 (1964), overruling *Stein v. New York*, 346 U.S. 156 (1953), the Court held it a violation of due process for a jury trying guilt or innocence to determine (for the first time) the voluntariness of the defendant's alleged confession. *Stein* had approved this procedure as compatible with accurate and reliable factfinding; but the *Jackson* Court, 378 U.S. at 385-386, stressed that *Stein* had failed to recognize the "complex of values" demanding that our trials be kept absolutely free from the taint of coerced confessions.

This Court should now carefully consider the "complex of values" which may be offended when the State ventures to overturn a representative jury's decision for the accused on the ultimate issue of life or death itself.

Guided by the criteria of *Proffitt*, *Dobbert* and *Barclay*, alone, States might well decide to override unreasonable jury acquittable in trials of guilt or innocence. By definition, this practice would enhance accuracy and consistency. Moreover, this minor exception to the absolute finality of a jury acquittal would affect only a few isolated defendants—as opposed to the many who benefit from trial level and appellate remedies after a jury conviction.

Yet as this Court observed so pertinently in *Gregg v. Georgia*, 428 U.S. 153, 199 n. 50 (1976), such a merciless quest for consistency would violate our deepest values:

[I]f a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new

trial ordered, since the discretionary act of jury nullification would not be allowed. . . . Such a system, of course, would be totally alien to our notions of criminal justice.

Moreover, it would be unconstitutional. . . . The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment.

In *Bullington v. Missouri*, 451 U.S. 430, 445 (1981), the Court made clear that the finality values articulated in *Gregg* "are equally applicable when a jury has rejected the State's claim that the defendant deserves to die. . . ."

Hence when subjected to the type of due process analysis made imperative by *Jackson v. Denno* and *Duncan*, the infliction of death in the face of a jury's decision for life is incompatible with our common law heritage and the Constitution.

Needless to say, a Florida trial judge's power to *reduces* a jury determination of *death* violates no constitutional precept.

In sum, the procedure of inflicting death after a jury decision for life is an anomaly; it is out of character with the ameliorative nature of Florida's overall capital punishment scheme, and with the law of the land. It should be declared unconstitutional.<sup>1</sup>

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1. Under Florida's system, overriding a jury life determination can serve only two rational purposes: (1) Correction of occasional "errors" for leniency of the sort we have always tolerated in trials of guilt or innocence, see *Tedder, supra*; and (2) Compliance with the Florida Supreme Court's holding that "allow-

## ARGUMENT

### **I. Imposition Of The Death Sentence Despite A Jury Determination For Life Violates The Due Process Clause Of The Fourteenth Amendment.**

May society constitutionally impose the ultimate sanction of death despite a jury determination in favor of life? This question implicates at once ancient Anglo-American traditions and the most recent "evolving standards of procedural fairness," see *Gardner, supra*.

While this issue is uniquely grave, it is at the same time profoundly simple. In resolving the issue this Court should be guided by our common law heritage and its inviolable respect for the jury as the "country" of a capitally accused defendant. Under the Due Process Clause of the Fourteenth Amendment, this is the governing law of the present case; all the rest is commentary.<sup>2</sup>

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(Continued from the previous page)

ing the jury's recommendation to be binding would violate *Furman*," see the case below, *Spaziano v. State*, 433 So.2d 508, 512 (Fla. 1983); *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1980); and *Douglas v. State*, 373 So.2d 895, 897 (Fla. 1979). The first purpose is alien to our merciful common law heritage, while the second is retrogressive and aberrant, see *Gregg, supra*, 428 U.S. at 199 n. 50 and 203. Respondent Florida will not be "significantly disadvantaged" by a prohibition of this anomaly; see *Dobbert, supra*, 432 U.S. at 296.

2. The Rabbi Hillel the Elder, as the oracle of another humane and progressively evolving legal system, was once asked to expound the entire Torah while standing on one leg. He replied: "What is hateful to you, do not unto your neighbor; this is the entire Torah, all the rest is commentary." See "Hillel (the Elder)," 8 *Encyclopaedia Judaica* 482, 484 (1972). Amicus would similarly expound the Due Process Clause: "What would be repugnant in a trial of guilt or innocence, must be avoided in the decision of life or death."

As stressed in *Gardner*, *supra*, 430 U.S. at 357-358, the life or death decision is inherently and constitutionally *sui generis*:

From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action.

Since the procedures now required for capital penalty determination are unique both in scope and in gravity, it is impossible to rely on any wooden rule or mechanical formula in deciding "what process is due"—or, as here, *undue*. At the same time, objective standards exist to aid in such a task.

Thus see *Presnell v. Georgia*, 439 U.S. 14, 16 (1978):

[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.

As emphasized in *Duncan*, *supra*, 391 U.S. at 149 n. 14, judgments of fundamental fairness must be based not on "imaginary and theoretical schemes" of justice, but upon "the common-law system that has been developing contemporaneously in England and in this country."

By logically piecing together these precepts of *Gardner*, *Presnell*, and *Duncan*, a coherent standard emerges of due process in the penalty phase of a capital trial. Of necessity, procedures used to determine life or death are unique; but they must not deviate arbitrarily from the fundamental norms which govern a trial on the issue of guilt.

More specifically, Florida's death penalty provision for overturning an unreasonable jury decision of life imprisonment must be tested by our legal heritage.

Examination of 700 years of Anglo-American tradition, including nearly 200 years since adoption of our Constitution, reveals that while the accused might at times be denied a jury, once a jury has been included in a criminal proceeding its verdict for the defendant has already been held inviolable.

While much has changed in our jurisprudence over the past seven centuries, this point has remained constant, see Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 Duke L. J. 283, 289 n. 26:

The finality of the verdict is its essential element, and is attested to from earliest common law times by the existence of coercive measures, such as attain, to persuade the jurors to change the verdict, *as only they could do*. (Emphasis supplied.)

Thus, although attempts were once made to intimidate, attain, or imprison a recalcitrant or "unreasonable" jury—the finality of a verdict of acquittal has been a permanent feature of our jurisprudence. This protection should not be abandoned now in capital penalty decisions.

That is the question which this Court must now confront, if the insights of *Gardner*, *Presnell*, and *Duncan* are to retain their vitality and meaning.<sup>3</sup>

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3. See also *Bullington*, *supra*, which at once follows from and amplifies the logic of these cases.



**A. This Procedure Violates Two Fundamental Principles Of Our Anglo-American Heritage: The Absolute Finality Of A Jury's Decision For The Accused; And The Preference To Err In Favor Of Life.**

Seeking guidance for the jurors and jurists of a new Nation, Mr. Justice James Wilson of this Court turned in his law lectures of 1790-1791 to an ancient source of lore: Andrew Horne's *Mirror of Justices* (c. 1300), which relates the legendary judgments of the Anglo-Saxon King Alfred (reigned 871-c. 899) against judges themselves unjust; see 2 J. Wilson, *Works* 515 (1967):

"He hanged Frebern, because he judged Harpin to death, when the jurors were in doubt as to their verdict; for when there is a doubt, they should save rather than condemn."

These texts are short: but they are pregnant with precious instruction. Each juror may here find a salutary lesson for his conduct, in the most important of all the transactions of a man or a citizen—in voting whether a fellow man and a fellow citizen shall live or die.

Modern scholarship may cast doubt on attempts to find jury trial as we know it in Anglo-Saxon times or even in the Magna Carta (1215)<sup>4</sup>; but by around 1300, as the *Mirror of Justices* attests, the emerging system of common law had begun to enshrine two cardinal values: the inviolability of a jury's judgment in favor of the

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4. For the modern view that jury trial cannot be traced directly to Magna Carta, see *Duncan, supra*, 391 U.S. at 151 and n. 16; on the early history of the jury, see *id.*, and also, e.g., *Williams v. Florida*, 399 U.S. 78, 86-91 (1970); and *Apodaca v. Oregon*, 406 U.S. 404, 407-408 (1972).

accused, and the more general predilection of the law to spare rather than to take human life. These two principles developed through the centuries and lead finally to our system of representative democracy and justice.

Because these principles have served as a foundation for our institutions, they are fundamental under the Due Process Clause, see *Presnell, supra*.

Writing in the late 15th century, Sir. John Fortescue took special pride as an English jurist in these intimately intertwining values of jury inviolability and willingness to permit error on the side of mercy, see J. Fortescue, *De Laudibus Legum Anglie* 65 (Tr. 1949):

Who, then, in England can die unjustly for a crime, when he can have so many aids in favour of his life, and none save his neighbors, good and faithful men, against whom he has no matter of exception, can condemn him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. (Chapter 27.)

English monarchs and magistrates did not always take such a lyrical view of the jury's inviolable prerogative to spare the life of the accused; while the defendant could not be executed in such cases, the jury might be subject to various sanctions for its unreasonableness.

In 1554, Sir Nicholas Throckmorton was charged with high treason for his alleged role in a conspiracy against Queen Mary I. Reaching a result quite extraordinary under the cruel law of treason then applicable, the jury weighed the evidence and found Throckmorton not guilty. Upon declaration of the verdict, the Attorney General requested the Court to detain "these men of the Jury, which have strangely acquitted the prisoner of his

treasons. . . ." In reply, Juror Whetston pled the cause of the jury: "I pray you, my lords, be good unto us, and let us not be molested for discharging our consciences truly. . . ." The jurors were then sent to prison, see *T. Rockmorton's Case*, 1 Howell St. Tr. 869, 899-900 (1554). Eventually the jurors were fined and released, see *id.* at 901-902.

Despite the religious and social turmoil of the 16th century, English writers continued to extol the humane values of the common law finality of a jury's acquittal and the unreviewability of the power to grant mercy. Hence in 1559, a certain Bishop Aylmer defended the new Queen Elizabeth I's right as a woman to reign in these terms, see G.R. Elton, *The Tudor Constitution: Documents and Commentary* 16 (1960):

What may she do alone wherein is peril? She may grant pardon to an offender, that is her prerogative wherein if she err it is a tolerable and pitiful error to save life. J. Aylmer, *An Harborowe for Faithful and True Subjects against the Late Blown Blast concerning the Government of Women* (1559).<sup>5</sup>

Another Elizabethan scholar, Sir Thomas Smith, condemned the continuing practice of punishing jurors for their verdicts which seemed unreasonable to the court; he described "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England." See W. Blackstone, 4 *Commentaries* 361 (1769), quoting, T. Smith, 3 *Commonwealth of England* c. 1 (c. 1565).

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5. Compare *Gregg, supra*, 428 U.S. at 199 n. 50 (jury's verdict of acquittal and President's power of executive clemency cited as unreviewable acts of discretion in favor of mercy).

Perhaps the most authoritative student of the jury's battle for independence, James Bradley Thayer, also reports Smith's observation that the bark of the judges was often worse than their bite, see J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 163 (1st ed. 1898).<sup>6</sup>

With the succession of James I in 1603 and the rise of Stuart absolutist claims, the Star Chamber became especially important in disciplining juries too favorable to the accused. See Thayer, *id.* at 164, citing a source from the year 1607:

"when a jury hath acquitted a felon or traitor against manifest proof there they may be charged, in the Star Chamber, for their partiality in finding a manifest offender not guilty. . . ." Citing *Floyd v. Barker*, 12 Co. 23.<sup>7</sup>

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6. "If, having pregnant evidence, nevertheless, the twelve do acquit the malefactor, which they will do sometime . . . the prisoner escapeth, but the twelve not only rebuked by the judges, but also threatened of punishment. . . . But this threatening chanceth oftener than the execution thereof." Quoting Smith, *id.*

7. During this early 17th-century period, the great champion of the common law Sir Edward Coke similarly explained why capital defendants were normally refused counsel: "the evidence to convict a person should be so manifest, as it could not be contradicted." See 4 Blackstone, *Comm.* 348-350, quoting E. Coke, 3 *Institutes* 137, and *Gideon v. Wainwright*, 372 U.S. 355 (1963), O.T. 1962, No. 155, *Brief for Petitioner* at 21 and n. 20. The concept of *Tedder*, *supra*—that some offenders may be so worthy of death that "virtually no reasonable person could differ" even though a jury has differed—seem strikingly and dangerously akin to this 17th-century attitude. It is noteworthy that Blackstone, *id.*, says that such doctrines seem "not to be all of a piece with the rest of the humane treatment of prisoners by the English law." One could say the same about overriding a jury life decision, as opposed to the overall "ameliorative" nature of Florida's death penalty scheme.

Under the reigns of James I and Charles I, the battle between the common law and the royal prerogative courts such as Star Chamber became part of a confrontation between absolutist and Parliamentary parties which led to the Civil Wars of 1642-1649, the Protectorate of Oliver Cromwell, and the restoration in 1660 of Charles II as a constitutional monarch ruling under a victorious common law. It is here worth observing that the absolutist party in the time of Charles I (reigned 1625-1649) chose as their motto "Thorough"—i.e. in modern terms, a more efficient and "consistent" administration of justice than juries and Parliaments would permit; see, e.g., G. M. Trevelyan, 2 *History of England* 173 (1953). Such clashing values are not wholly alien to the present case before this Court.

While judge-jury conflict sometimes touched directly upon matters of politics and treason, in other instances the jury appeared too lenient to the judges in a capital homicide case (the precise situation here). See Thayer, *id.* at 166:

In 1666 Kelyng, now Chief-Justice, fined a jury five pounds apiece for a verdict of manslaughter where he had directed them that it was murder. . . . In 1667, Kelyng fined eleven of the grand jury twenty pounds apiece for refusing to indict for murder, and the judges of the King's Bench held this good. The reporter makes the judges add, "And when the petty jury, contrary to direction of the court, will find a murder manslaughter . . . yet the court will fine them."

There, as here, the jury had convicted a defendant of criminal homicide, but then refused to make additional findings of fact required for imposition of the death sentence; see also *Bullington, supra*.

The decisive battle for jury independence was won in 1670, when a London jury refused to convict William Penn and his friend William Mead, despite their manifest participation in illegal Quaker activities upon the specific charge of preaching before an unlawful assembly. Powerless to override the jury's refusal to convict, the court imprisoned the jury. Then Penn spoke in defense of his peers, see *Penn & Mead's Case*, 6 Howell St. Tr. 951, 963 (1670):

I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict.<sup>8</sup>

Despite prolonged confinement, the jury courageously adhered to its verdict. Thus Penn and Mead were acquitted of the main charge, although Penn and the jurors alike were imprisoned for contempt of court.

In the monumental decision of *Bushell's Case*, 6 Howell St. Tr. 999 (1670), foreperson Bushell and his fellow jurors gained release under a writ of *habeas corpus*. Beyond freeing these particular jurors, the decision estab-

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8. Note that the word "arbitrary" here carries its vigorous sense of "despotic, tyrannical"; see 1 OED 426, *arbitrary* (4). As William Penn well understood, refusal to respect a jury's decision for the accused is thus *arbitrary* even if motivated by a desire for "rationality" and "consistency." The type of unguided and unfocused procedure for deciding life or death condemned in *Furman*, on the other hand, would fit the definition of *Arbitrary* (3), *id.*: "... capricious, uncertain, varying." In order to avoid the "arbitrariness" prohibited in *Furman*, juries must "be carefully and adequately guided" in deliberating life or death, see *Gregg, supra*, 428 U.S. at 193; in order to avoid the arbitrariness condemned by William Penn, these same juries must be granted the last word when they speak to spare life.

lished the right of all jurors to follow their consciences in doing justice without fear of punishment.

Chief Justice Vaughan of the Court of Common Pleas explained why a jury's sworn finding of facts for the accused must be inviolate, see *id.* at 1012:

A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or infer the thing to be resolved by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least *in foro conscientie*.

Similarly, in *Witherspoon v. Illinois*, *supra*, 391 U.S. at 519-520, this Court said that the jury "can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."

With *Bushell's Case*, the English common law had established a firm framework for mutual respect between judges and juries in criminal cases. A century later, in 1769, Sir William Blackstone could take the perspective of a historian; in this role, he reports that the practice of "punishing jurors . . . for finding their verdict contrary to the discretion of the judge, was arbitrary, unconstitutional and illegal. . . ." See 4 W. Blackstone, *Commentaries* 361. As Blackstone adds, *id.*:

But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.

The inviolate finality of a jury's findings for the accused, a fundamental principle of English law for five centuries by the time of Blackstone, became a keystone of representative justice in America.

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As shown in F.H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 14-22 (1951), the first permanent colonists of Virginia and Massachusetts brought the jury trial with them as a cherished English right; the institution flourished in its new setting. See also *Duncan, supra*, 391 U.S. at 152.

Like William Penn's acquittal by a London jury in 1670, John Peter Zenger's acquittal by a New York jury in 1735 advanced the values of an independent jury. Charged with seditious libel, Zenger was defended by Andrew Hamilton. See J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* (1963).

As editor Stanley Nider Katz, *id.* at 22-23, sums up:

Hamilton chose to address himself to the jurors. . . . Specifically, he maintained that truth was a defense against an accusation of libel, and that the jury had the right to return a general verdict where law and fact were intertwined.

Invoking *Bushell's Case*, he urged the jurors to trust their own sense of justice and reason, see *id.* at 93:

[J]urymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.

Assuring the jury of their right to find Zenger's publication nonlibelous, Hamilton cited the undisputed power of a jury in a capital homicide trial to spare the defend-

ant's life by finding manslaughter rather than murder<sup>9</sup>;  
see *id.* at 91:

As for instance; upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to manslaughter or murder, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say whether our newspapers are a libel or no libel as another jury has to say whether killing of a man is murder or manslaughter.

Four decades later, jury trial was a fundamental value to the Framers of the Declaration of Independence and the Constitution. See, e.g., *Duncan, supra*, 391 U.S. at 152-153.

Mr. Justice Wilson regarded the finality of a jury's decision in favor of life to be basic to the system of ordered liberty then being established as he lectured in 1790-1791. Pointing out that "a jury, in criminal cases, may, indeed, be called the country of the person accused," see 2 *Works* at 529, Wilson cited the precept of an Empress of Russia, see *id.*:

"In a well tempered government, no person is deprived of his life, unless his country rise up against him."

Let others know, and teach, and publish, and recommend fine political principles; it is ours to reduce them to practice.

It is repugnant to this fundamental principle to execute a Florida defendant after his "country" have deliberated and voted for life.

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9. Hamilton's logic is much akin to that followed in *Bullington* (issues in penalty phase of capital case analogous to these in guilt phase); in this case, such logic demands finality for the jury's life determination.

In extolling the inviolability of the "country's" decision to spare a defendant's life, Mr. Justice Wilson did not overlook the faults of juries; rather he understood that in the common law and to the Framers of the Constitution a deliberate choice had been made, see *id.* at 541:

Juries undoubtedly may make mistakes: they may commit errors: they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. . . . Besides, their mistakes and their errors, except the venial ones on the side of mercy made by traverse juries, are not without redress.

Thus in *United States v. Perez*, 9 Wheat. 579 (1824), which established the double jeopardy rule that a defendant may be retried after a hung jury, Mr. Justice Story added words of caution, see *id.* at 580:

[I]n capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

From this standpoint, there is nothing more alien to a sense of justice than for a judge to interfere with a jury's sworn determination of life by imposing death. Such a practice is inhumanly burdensome to any reasonably compassionate judge, as well as to the jury, the community and the defendant. A statute demanding such a cruel and unusual duty of a judge is contrary to the fundamental law of the land.

Further recognition that capital juries have acted in a lenient manner is found early in our national history in *United States v. Harding*, 26 Fed. Cas. 131, 135 (Case No. 15, 301) (C.C. E. Dist. Penn. 1846). There Circuit Justice Grier noted that co-defendants in a capital mur-

der case typically met fates determined by the equity of the jury rather than the letter of the law:

In such cases the law esteems every one who aids and abets in the perpetration of the crime as a principal offender, and awards the same punishment to all, without measuring the degree of their participation; yet juries are always unwilling to sacrifice a hecatomb to appease offended justice. They usually select one or two of the most active ringleaders as victims to suffer the extreme penalty of the law, and, usurping the prerogative of the executive, they pardon, rather than acquit, the remainder.

In *Gregg, supra*, 482 U.S. at 182, this Court found much the same patterns:

[T]he reluctance of juries in many cases to impose the [death] sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.

For a state to overcome this natural reluctance by overturning a jury's decision to spare life violates principles which are deeply ingrained as part of our fundamental values.

Thus, the finality of a jury's decision to spare life is consistent with the overall predilection to err, if at all, on the side of mercy. Two decisions make clear why overturning a jury determination of life is radically different from overturning a determination of death.<sup>10</sup>

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10. Amicus stresses this point in light of *Spaziano v. Florida*, O.T. 1983, No. 83-5596, *Brief for Respondent in Opposition* at 8: "It is submitted that judges can, and do, overturn advisory sentences favoring death regularly. While Mr. Spaziano may not agree with the override procedure, many of his fellow murderers undoubtedly welcome it."

In *Re Winship*, 397 U.S. 358, 372 (1970), which extended the reasonable doubt standard to juvenile delinquency proceedings as part of due process, Mr. Justice Harlan (concurring) mirrored the language of Sir John Fortescue almost 500 years earlier:

I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

In *Jackson v. Virginia*, 443 U.S. 307, 317 n. 10 (1979), this Court stated a corollary to the "fundamental value determination" noted above:

To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of "not guilty." . . . The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty.

In light of *Gardner*, *Presnell*, and *Bullington*, *supra*, these Fourteenth Amendment values should apply equally when a jury has chosen life imprisonment as the proper sentence between life and death.

A jury's determination of life imprisonment is at worst a tolerable error "upon the side of mercy" which should remain "unassailable," see *Jackson v. Virginia*, *supra*. However, an unreasonable jury determination of death is subject to judicial review, see *id.*; and a State may decide that trial judges, who actually observe the defendant, should have this authority.

Although the States retain broad discretion "to allocate functions between judge and jury as they see fit,"

this discretion is subject to the transcendent constraints of the Fourteenth Amendment, see *Jackson v. Denno*, *supra*, 378 U.S. at 391 n. 19.

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### CONCLUSION

The judicial function of imposing death after a penalty jury has decided to spare a defendant's life is repugnant to our fundamental principles of procedural fairness—and is prohibited by the Due Process Clause.

Therefore, Amicus submits that Petitioner's death sentence should be vacated.

Respectfully submitted,

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No. 83-5596-CSY  
Status: GRANTED  
CAPITAL CASE

Title: Joseph Robert Spaziano, Petitioner  
v.  
Florida

Court: Supreme Court of Florida

Counsel for petitioner: Barnard, Craig S.

Docketed:  
October 11, 1983

Counsel for respondent: Menser, Mark C.

Entry	Date	Note	Proceedings and Orders
1	Sep 1 1983		Application for extension of time to file petition and order granting same until October 11, 1983 (Powell, September 2, 1983).
2	Oct 11 1983	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 19 1983		Brief of respondent Florida in opposition filed.
5	Nov 23 1983		DISTRIBUTED. December 9, 1983
6	Nov 30 1983	X	Reply brief of petitioner Joseph R. Spaziano filed.
8	Dec 12 1983		REDISTRIBUTED. January 6, 1984
10	Jan 9 1984		Petition GRANTED. *****
11	Feb 23 1984		Joint appendix filed.
12	Feb 23 1984		Brief of petitioner Joseph R. Spaziano filed.
13	Feb 23 1984	G	Motion of Richard W. Ervin, et al. for leave to file a brief as amici curiae filed.
14	Mar 5 1984		Motion of Richard W. Ervin, et al. for leave to file a brief as amici curiae GRANTED. Justice Marshall OUT.
15	Mar 5 1984		Application for leave to file petitioner's brief on the merits in excess of the pages filed with LFP (A-705).
16	Mar 6 1984		Order granting same not to exceed 54 pages by Powell, J.
17	Mar 10 1984		Record filed.
18	Mar 10 1984		Certified original record, 10 volumes, received.
19	Mar 19 1984		Brief of respondent Florida filed.
20	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 17, 1984. (2nd case)
21	Mar 26 1984		CIRCULATED.
22	Apr 17 1984		ARGUED.